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NO. 87-372

In the Supreme Court of the United States

OCTOBER TERM, 1987

AMOCO PRODUCTION COMPANY,
Petitioner,

v.

DONALD P. HODEL, SECRETARY,
DEPARTMENT OF THE INTERIOR,
WILLIAM D. BETTENBERG, DIRECTOR,
MINERALS MANAGEMENT SERVICE,
AND THE DEPARTMENT OF THE INTERIOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 23 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349, waives sovereign immunity and grants jurisdiction to the district courts of the United States of a case seeking the refund from the United States of mineral production royalties in excess of $10,000.

2. Whether an administrative decision of the Secretary, Department of Interior, that could form the basis for a money claim in excess of $10,000, is reviewable in the district courts of the United States under Section 23 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349.

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MINERALS MANAGEMENT SERVICE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Amoco Production Company ("Amoco"), [1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on April 29, 1987.

[1] Pursuant to Rule 28.1, petitioner states that its parent corporation is Amoco Company which is in turn a wholly owned subsidiary of Amoco Corp. and that all other subsidiaries and affiliates are wholly owned by Amoco Corp., Amoco Company, or Amoco Production Company.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 815 F.2d 352, and is reprinted in the appendix hereto, p. A-2, *infra*. The memorandum ruling of the United States District Court for the Western District of Louisiana (Duhe, J.) is reported at 627 F. Supp. 1375, and is reprinted in the appendix hereto, p. A-36, *infra*. The decision of the Interior Board of Land Appeals is reported at 78 IBLA 93, and is reprinted in the appendix hereto, p. A-49, *infra*.

JURISDICTION

On April 29, 1987, the Fifth Circuit entered its judgment and opinion vacating the district court's judgment for lack of subject matter jurisdiction and remanding to the district court with instruction to transfer the case to the United States Claims Court pursuant to 28 U.S.C. § 1631. No petition for rehearing was sought. On July 17, 1987, Justice White granted petitioner's application for an extention of time and extended the time for filing a petition for writ of certiorari to and including August 27, 1987. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 23 of the Outer Continental Shelf Lands Act ("OCSLA"), 92 Stat. 657 (1978) (codified as amended at 43 U.S.C. § 1349). Citizens suits, jurisdiction and judicial review.

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security

(1) Except as provided in this section,

any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or

. . .

(5) A court, in issuing any final order in any action brought pursuant to subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The

court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this subchapter, or any regulation promulgated under this subchapter, or the terms of any permit or lease issued by the Secretary under this subchapter, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation,

> suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.
>
> . . .[2]

Section 10 of the OCSLA, 67 Stat. 469 (1953), 43 U.S.C. § 1339. Refunds; filing time limitation; certification of repayment; necessity of report to Congress.

> (a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953. The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.

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[2] Subsection (c) pertaining to the review of leasing programs and exploration or production plans is not relevant to this petition.

(b) No refund of or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively: Provided, That if the Congress shall not be in session on the date of such submission or shall adjourn prior to the expiration of thirty days from the date of such submission, then such payment or credit shall not be made until thirty days after the opening day of the next succeeding session of Congress.

28 U.S.C. § 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) . . .;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley authority.

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

STATEMENT OF THE CASE

The jurisdiction of the district court, the issue for which certiorari is requested, was invoked under Section 23(b)(1) of the OCSLA quoted above. Petitioner also invoked the jurisdiction of the district court under 28 U.S.C. § 1331 (federal question) and 1337 (commerce).[3] Suits against the United States require a waiver of sovereign immunity, and such waiver is found in both sections 10 and 23(a) of the OCSLA, 43 U.S.C. §§ 1339 and 1349(a).

This controversy arises out of a dispute over the proper royalty valuation of gas produced from a lease issued by the Secretary, Department of the Interior ("DOI"), pursuant to the OCSLA.[4] Following an audit of the royalties paid on gas produced from this lease, on July 20, 1982, an officer of the Minerals Management Service ("MMS") ordered petitioner to pay additional royalties in the amount of $10,424,298.62. The MMS also assessed petitioner late payment charges in the amount of

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[3] Jurisdiction under either 28 U.S.C. §§ 1331 or 1337 is not the subject of this petition.

[4] The OCSLA requires the payment of a royalty based upon a percentage "in amount or value of the production saved, removed, or sold." 43 U.S.C. § 1337(a)(1)(A), (B), (C), (F), (G) and (b)(3).

$3,920,015.52.[5]

Pursuant to DOI regulations, Amoco appealed these orders to the Director, MMS, and subsequently to the Interior Board of Land Appeals ("IBLA"). In both of these administrative appeals, Amoco argued that the gas being sold to its purchaser was subject to the maximum lawful price established by Section 105 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3315, which maximum lawful price was equal to the contract price at which Amoco sold the gas to its purchaser, and that it was unlawful for the MMS to establish a royalty value in excess of the maximum lawful price. The IBLA, acting for the Secretary, determined that Section 105 did not establish the maximum lawful price for the gas sold from this lease and thus affirmed the MMS orders. 78 IBLA at 99; p. A-60, *infra*.

Thereafter, Amoco filed a Notice of Violation as required by 43 U.S.C. § 1349(a)(2)(A) and subsequently appealed the IBLA's decision to the United States District Court for the Western District of Louisiana, alleging jurisdiction under Section 23(b)(1) of the OCSLA, 43 U.S.C. § 1349(b)(1), and 28 U.S.C. §§ 1331 and 1337. In this review of agency action, Amoco sought (1) a declaratory judgment that the IBLA's decision was arbitrary, capricious, and an abuse of discretion, (2) a permanent injunction against the respondents from enforcing or applying the decision reviewed, and (3) a remand to the DOI for further consideration of Amoco's appeal and the proper calculation of royalties and interest.

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[5]Although Amoco conceded that it owed a portion of the disputed royalty amount and late payment charges, the remaining amount in dispute greatly exceeds $10,000. 815 F.2d at 355 n.4; p. A-7 n.4, *infra*.

The respondents filed a motion to dismiss for lack of subject matter jurisdiction, asserting that the United States Claims Court had exclusive jurisdiction over this appeal pursuant to the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491. The district court denied this motion but ultimately affirmed the IBLA's decision, even though it determined that the gas produced from this lease was subject to the Section 105 maximum lawful price. 627 F. Supp. at 1378 and 1380; pp. A-41 and A-47, *infra*.

Amoco then appealed this decision to the United States Circuit Court of Appeals for the Fifth Circuit. Before the circuit court, Amoco again argued that it was unlawful for the Secretary to establish a royalty value for gas that exceeded the maximum price at which the gas could be sold. In addition, and alternatively, Amoco contended that the district court erred by failing to remand this case to the IBLA following the court's determination that the gas being valued was subject to the maximum lawful price established under Section 105 of the NGPA.[6] The Fifth Circuit, however, did not reach the merits of Amoco's claim, but declared that the district court lacked jurisdiction to consider this appeal.

The circuit court, relying on an earlier Fifth Circuit decision, *Graham v. Henegar,* 640 F.2d 732 (5th Cir. 1981), first determined that the Tucker Act granted *exclusive* jurisdiction to the United States Claims Court for claims against the United States exceeding $10,000 founded upon

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[6] The IBLA based its decision affirming the MMS orders on its determination that Section 105 of the NGPA did not apply to the gas being valued. 78 IBLA at 99; p. A-60, *infra.* Under this Court's holding in *SEC v. Chenery Corp.,* 318 U.S. 80, 95 (1943), "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." See also, *SEC v. Chenery Corp.,* 332 U.S. 194, 195 (1947).

the Constitution, any statute or regulation, or any contract with the United States. It further determined that "the Claims Court is the sole forum for the adjudication of such a claim, even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court." 815 F.2d at 358; p. A-14, *infra.* The court then analyzed whether the three conditions set forth in the Tucker Act were present in this case:

(1) The action is against the United States;

(2) The action is founded upon the Constitution, federal statute, executive regulation, or government contract; and

(3) The action seeks monetary relief in excess of $10,000.

815 F.2d at 359; p. A-14, *infra.* The court had no difficulty finding that the first two conditions were clearly satisfied, but stated that the third condition was "not susceptible to simple resolution." 815 F.2d at 361; p. A-19, *infra.*.[7]

The circuit court then analyzed the three types of relief sought by Amoco in this case and compared that relief with that sought in various appellate court decisions dealing with Tucker Act jurisdiction, none of which addressed the contention that both jurisdiction and waiver of sovereign immunity were based upon the OCSLA. Finding that Amoco seeks as its "primary objective" or "ultimate aim" the return of money it has previously paid the government, the court held that this case is "*best* characterized as an action primarily seeking monetary relief (in excess of $10,000) from the United States, with exclusive

[7] The Fifth Circuit admitted that "this is a 'close case' with legitimate arguments to be made for both positions." 815 F.2d at 361; p. A-19, *infra.*

jurisdiction therefore lying in the Claims Court. . . ." 815 F.2d at 361; p. A-19, *infra* (emphasis in original).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the decision of the Fifth Circuit because this decision would establish for the first time -- and on the basis of a rationale that conflicts with prior reasoning of this Court and other circuit courts -- the jurisdictional relationship between the United States Claims Court under the Tucker Act and the United States district court under the OCSLA. In addition, this jurisdictional determination will have an enormous impact on interests which have arisen under the OCSLA.

1. The Decision Below Raises Important Questions Concerning the Relationship Between the Jurisdiction of the U.S. Claims Court Under the Tucker Act and the U.S. District Court Under the OCSLA and Conflicts with the Reasoning of This Court and Other Circuits.

Because the Fifth Circuit determined that the Tucker Act granted exclusive jurisdiction over this suit to the United States Claims Court, the court never reached the questions of whether the OCSLA both (a) waived sovereign immunity and (b) granted jurisdiction to the district courts of the United States over this case. Thus, even assuming that the Fifth Circuit was correct when it characterized this suit as one for a money judgment, important issues concerning the exclusivity of the Tucker Act remedy and the independent waiver of sovereign immunity and jurisdictional grant under the OCSLA were not addressed.

There is apparent confusion among the circuits concerning the exclusivity of the Tucker Act remedy. In

Graham v. Henegar, supra, relied upon by the Fifth Circuit below, numerous cases from the First, Second, Fourth, Fifth, Eighth, Ninth and District of Columbia Circuits are cited for the proposition that the Tucker Act establishes exclusive Claims Court jurisdiction over all non-tort claims for money damages in excess of $10,000 against the United States. 640 F.2d at 734 n.5 and 6.[8] However, each of these cases relied upon by the Fifth Circuit below holds only that a general waiver of sovereign immunity (*e.g.,* the Administrative Procedure Act) or a general grant of jurisdiction (*e.g.,* federal question jurisdiction under 28 U.S.C. § 1331) is insufficient to allow district court review of monetary claims over $10,000. 640 F.2d at 734 n.6. None of these cases address whether a special, limited grant of district court jurisdiction and waiver of sovereign immunity such as 43 U.S.C. § 1349 can co-exist with the Tucker Act. In fact, there are several statutes that both waive sovereign immunity and grant jurisdiction to the district courts over suits that ordinarily would fall within the jurisdiction of the Claims Court under the Tucker Act. For example, in *Munoz v. Small Business Administration,* 644 F.2d 1361, 1364-65 (9th Cir. 1981), the Ninth Circuit held that the district court has jurisdiction over contract actions against the Small Business Administration for money damages in excess of $10,000 by virtue of 15 U.S.C. § 634(b)(1). *Accord, Expedient Services, Inc. v. Weaver,* 614 F.2d 56, 57 (5th Cir. 1980); *Mar v. Kleppe,* 520 F.2d 867, 870 (10th Cir. 1975).

Likewise, the D.C. Circuit has held that 5 U.S.C. § 8912, the jurisdictional provision of the Health Benefits

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[8] In addition, the Third and Sixth Circuits also espoused this view. *See Matthews v. United States,* 810 F.2d 109, 111 (6th Cir. 1987); *Hahn v. United States,* 757 F.2d 581, 586 (3d Cir. 1985).

Act, both waives sovereign immunity and grants jurisdiction to the district courts regardless of the amount in controversy. *National Treasury Employees Union v. Campbell,* 589 F.2d 669, 673-74 (D.C. Cir. 1978). In *Barnes v. United States,* 307 F.2d 655, 657 (D.C. Cir. 1962), the District of Columbia Circuit also determined that 5 U.S.C. § 2103, the jurisdictional grant of the Federal Employees' Group Life Insurance Act of 1954, established jurisdiction and waived sovereign immunity for suits that arguably would fall within the jurisdiction of the Tucker Act. *See also Bor-Son Building Corp. v. Heller,* 572 F.2d 174, 182 n.14 (8th Cir. 1978) (holding that the Tucker Act does not foreclose jurisdiction of the district court pursuant to 28 U.S.C. § 1442(a)(1); *Trans-Bay Engineers and Builders, Inc. v. Hills,* 551 F.2d 370, 375-76 (D.C. Cir. 1976)(allowing a suit on a contract claim for an amount over $10,000 in district court by virtue of 12 U.S.C. § 1702).

Finally, this Court's reasoning in *United States v. United Continental Tuna Corp.,* 425 U.S. 164, 172-81 (1976) implies that the Tucker Act jurisdiction is not exclusive by permitting contract actions in excess of $10,000 to be decided in the district courts under the Suits in Admiralty Act, 46 U.S.C. §§ 741, *et seq.,* and the Public Vessels Act, 46 U.S.C. §§ 781, *et seq.* Thus, there is judicial disagreement as to whether the Tucker Act remedy is exclusive when its conditions are met or whether a more particular, later-enacted statute waiving sovereign immunity and granting jurisdiction to the district court can co-exist with the Tucker Act.

Petitioner contends that a limited and more specific waiver of sovereign immunity and grant of jurisdiction in a subsequently enacted statute can either co-exist with or nullify the Tucker Act remedy and that the OCSLA is such a statute. By its plain language, the OCSLA both grants jurisdiction to the district court and waives sovereign immunity with regard to any alleged violation of the OCSLA.

Section 23(b)(1) grants jurisdiction to the district courts of the United States in "cases and controversies arising out of or in connection with (A) any operation conducted on the outer Continental Shelf which involves . . . production of the minerals, of the subsoil and seabed of the outer Continental Shelf. . . ." 43 U.S.C. § 1349(b)(1). Since royalties are due on gas production, it is evident that a dispute as to the proper valuation of the gas on which the royalties are based arises out of or is in connection with the production of minerals. Likewise, Section 23(a) waives sovereign immunity when it allows any person adversely affected (including lessees) to commence a civil action to compel compliance with the OCSLA against any person "including the United States, and any other governmental instrumentality or agency . . . for any alleged violation of any provision of [the OCSLA] or any regulation promulgated under the [OCSLA]." 43 U.S.C. § 1349(a)(1). Petitioner has alleged that the DOI has improperly valued the gas production for royalty purposes in contravention of the OCSLA and has improperly applied its royalty valuation regulation[9] for calculating the value.

In addition, subsection (a)(6) of Section 23, 43 U.S.C. § 1349(a)(6), provides that

> all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the

[9] 30 C.F.R. § 250.64 (1979) presently codified at 30 C.F.R. § 206.150 (1986).

> provisions of the [OCSLA], or any regulation promulgated under the [OCSLA], . . . shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

At the least, this suggests that a plaintiff has the choice of bringing an OCS-related action in district court or a Tucker Act claim in the Claims Court. And, to the extent that the waiver of sovereign immunity must explicitly allow money damages,[10] such waiver can be found in both Section 23(a)(5), 43 U.S.C. § 1349(a)(5), which allows the award of costs of litigation, including attorney and expert witness fees, and Section 10, 43 U.S.C. § 1339, which provides a procedure for obtaining refunds from the U.S. Treasury through the Secretary, DOI, without any limitation as to amount.[11] Indeed, in *Conservation Law Foundation of New England, Inc. v. Secretary of Interior,* 790 F. 2d 965, 967-68 (1st Cir. 1986), the First Circuit affirmed a district court's grant of attorney fees pursuant to Section 23(a)(5) greatly in excess of $10,000 without even discussing the Claims Court jurisdiction under the Tucker Act.[12]

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[10] See *United States v. Testan,* 424 U.S. 392, 400 (1976) ("In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity. . . .").

[11] The court below held that § 10 can be interpreted as mandating compensation by the federal government, a jurisdictional requirement for invocation of the Tucker Act. Section 10 can also be interpreted as a waiver of sovereign immunity for claims for the refund of excess royalties regardless of the amount.

[12] In *Graham v. Henegar,* 640 F.2d 735, relied upon by the court below, the Fifth Circuit determined that attorney's fees should be included in calculating the amount of a claim for Tucker Act jurisdictional purposes based upon the structure of the Tucker Act and the courts' treatment of attorney fees under the jurisdictional statutes (*e.g.,* 28 U.S.C. §§1331 and 1332) which require calculation of the amount of the "matter in controversy."

In addition, even though no reported case has discussed the jurisdictional grant and waiver of sovereign immunity contained in the OCSLA in explicit terms, several courts have reviewed DOI decisions concerning payments under either offshore or onshore leases without apparent conflict with the Tucker Act. *See Marathon Oil Co. v. Kleppe*, 556 F.2d 982 (10th Cir. 1977); *Amoco Production Co. v. Andrus*, 527 F. Supp. 790 (E.D. La. 1981); *Gulf Oil Corp. v. Andrus*, 460 F. Supp. 15 (C.D. Cal. 1978); *Marathon Oil Co. v. Andrus*, 452 F. Supp. 548 (D. Wyo. 1978); *Standard Oil Co. v. Hickel*, 317 F. Supp. 1192 (D. Alaska 1970), *aff'd*, 450 F.2d 493 (9th Cir. 1971); *Pan American Petroleum Corp. v. Udall*, 192 F. Supp. 626 (D. D.C. 1961); *California Co. v. Seaton*, 187 F. Supp. 445 (D. D.C. 1960), *aff'd*, 296 F.2d 384 (D.C. Cir. 1961). None of the published opinions contain discussion of the basis for the court's exercise of jurisdiction in relation to possible exclusive jurisdiction in the Claims Court under the Tucker Act. Consequently, it is unknown whether these courts determined that the suits were not claims for a money judgment or whether they determined that the OCSLA or its onshore counterpart, the Minerals Lands Leasing Act, 30 U.S.C. §§ 188, *et seq.*, granted district court jurisdiction and waived sovereign immunity. However, given the significant number of cases in which the district courts have exercised jurisdiction over claims analogous to Amoco's claim in this case, it appears that the jurisdictional issues have been so straightforward as to have been decided *sub silentio*. The decision below conflicts with these previously decided cases.

Even if this Court finds that the United States Claims Court jurisdiction under the Tucker Act is exclusive in this case, an important jurisdictional question remains: whether this suit to review the administrative decision of the DOI, which undoubtedly could form the basis for a monetary claim, is best characterized as a monetary

claim subject to the jurisdiction of the U.S. Claims Court under the Tucker Act. Petitioner does not deny that a favorable decision by the Fifth Circuit would form the basis for a money claim; but, that effect does not cause a district court to lose jurisdiction for the non-monetary relief sought. *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981); *see Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n. 15 (1978). Numerous circuit courts have held that if the declaratory injunctive relief sought has significant prospective effect or considerable value apart from merely determining monetary liability, the equitable relief sought is paramount and the district court may assume jurisdiction over the non-monetary claims. *E.g., Minnesota by Noot v. Heckler*, 718 F.2d 852, 858 (8th Cir. 1983)(and numerous cases cited therein).[13]

The prospective relief sought by Amoco is substantial and, indeed, primary, even though a favorable decision by the Fifth Circuit would constitute a basis for a money claim against the United States. Presently pending in the administrative process are three cases involving the identical facts as those in the case decided below in which the

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[13] The court below, however, applied this test in a manner different from the other circuits. It first determined that a decision in petitioner's favor would result in a payment of more than $10,000. It then found that petitioner's concerns necessitating the declaratory and injunctive relief were illusory and answered by the doctrines of *stare decisis* and *res judicata* and, to a lesser extent by practical considerations. 815 F.2d at 367; p. A-33, *infra*. This dismissal of petitioner's requested prospective relief goes beyond the test applied by other circuits in determining whether the non-monetary or monetary relief was primary. In each of the numerous cases cited by the Fifth Circuit below (815 F.2d at 361; p. A-20, *infra*), the court merely analyzed the relief sought to determine which was primary. Indeed, in practically all cases, the court could have dismissed the non-monetary claims using the same rationalization as the Fifth Circuit. Rather, in each of the other cases, the court analyzed the types of relief sought to determine which was primary or most important without regard to the doctrines of *stare decisis* and *res judicata*.

MMS is seeking the payment of additional royalties.[14] In addition, petitioner has several administrative cases involving a requested refund based upon the same operative facts as those in the suit below. Finally, the basic legal issue involved in the suit below, *i.e.*, whether the MMS has the discretionary authority to establish a royalty value in excess of the maximum lawful price at which a lessee can sell the gas, has considerable prospective effect and value since the MMS, by virtue of its mandate under the OCSLA, will continue to attempt to maximize royalty revenue under that statute.

2. The Jurisdictional Determination Will Have Immediate and Lasting Impact of Great Importance.

Because jurisdictional questions concern the power and authority of a court to decide a controversy, they are, by their nature, extremely important. And, to the extent that these questions involve potential concurrent jurisdiction between two courts, they address the plaintiff's right to choose his forum to resolve the controversy. This

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[14] The cases have been appealed to the Director, MMS, and have been assigned the following docket numbers: MMS-87-00069-OCS, MMS-87-0070-OCS, and MMS-87-0184-OCS. In each of these cases, petitioner has posted a bond in lieu of payment as now permitted by 30 C.F.R. § 243.2 (1986). Thus, any adverse decision from the DOI would be appealed not to the United States Claims Court, but rather to the district court. *See* 815 F.2d at 361 n.10; p. A-19, *infra*. In the cases bearing docket numbers MMS-87-0069-OCS and MMS-87-0070-OCS, petitioner has requested that these actions be stayed pending a final decision by the reviewing court on the case below. The Regional Manager, MMS, has stated, however, that these administrative cases are in a different posture because a bond has been posted and they would not be appealed to the Claims Court. He has recommended that they not be stayed. Evidently, the MMS does not intend to be bound by a decision by the Claims Court concerning these cases. Consequently, the Fifth Circuit's reliance on the doctrine of *stare decisis* is misplaced.

Court has frequently recognized the importance of jurisdictional questions in writ applications. *E.g., U.S. v. Sherwood*, 312 U.S. 584, 586 (1941) (in which the court stated that "the question of the jurisdiction of the district court under the Tucker Act [was] of public importance."); *United States v. Hohri, et al.*, ____ U.S. ____, 107 S.Ct. 2246, 2249 (1987) (in which this Court granted certiorari in part "because of the importance of the jurisdictional question. . . .").

The jurisdictional questions concerning the relationship between the jurisdictional grants contained in the OCSLA and in the Tucker Act have immediate impact. Presently pending in the Fifth Circuit, on appeal from decisions from the district courts of both the Western District of Louisiana and the Eastern District of Louisiana, are three cases having contrary district court results concerning the issue of whether royalties are due on contractual take-or-pay payments under the OCSLA. These cases have been consolidated on appeal. In two cases, *Mesa Petroleum Co. v. United States Department of Interior*, No. 87-4069, and *Diamond Shamrock Exploration Company v. Hodel*, No. 87-3207, the plaintiffs are not seeking a refund of royalties previously paid. Consequently, those cases are properly before the Fifth Circuit on appeal since there were no monetary claims at issue in the district court and the Tucker Act would not apply. In *Cities Service Oil & Gas Corp., et al. v. Hodel*, No. 87-3105, at least three of the plaintiffs are seeking a refund of royalty payments in addition to a declaratory judgment and injunctive relief. The remaining plaintiffs in that consolidated case are not seeking money refunds from the United States but merely are seeking prospective declaratory and injunctive relief. Based upon the Fifth Circuit's holding below, the United States is arguing that at least three of the disputes consolidated in *Cities Service* are not properly before that court because the district court lacked jurisdiction to adjudicate their

monetary claim. Again, based upon its holding in the case below, the Fifth Circuit would presumably remand the three disputes involving monetary refunds to the district court with instructions to transfer to the Claims Court. If this were to happen, important legal issues concerning the proper payment of royalties under the OCSLA would be relegated to two different courts with potentially different resolutions. The granting of this petition could avoid this unnecessary, bifurcated adjudication of this important judicial issue.

The jurisdictional issues raised below would also have a lasting impact. Petitioner paid the disputed royalty amount and late payment charges to avoid potentially serious adverse effects if it ignored the DOI's order during the pendency of its appeal. 815 F.2d at 361 n.10, p. A-19 n.10, *infra*). According to the MMS regulations, the administrative order requiring the payment of additional royalties is not stayed during the pendency of an administrative appeal. Consequently, a lessee refuses to pay at its peril. If it is ultimately determined that the royalties were due, the lessee faces potentially severe civil and possible criminal penalties under the Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§ 1701, *et seq.*, and the potential loss of its lease pursuant to Section 5(d) of the OCSLA, 43 U.S.C. § 1334(d). Admittedly, the MMS is now, pursuant to its regulation contained at 30 C.F.R. § 243.2 (1986), permitting lessees to post a bond in lieu of payment pending the administrative appeal. However, this right to post a bond does not address those administrative appeals presently in the system for which the royalties have already been paid. Nor does it address those cases in which the lessee is unable to obtain a bond and must pay the disputed royalties during the pendency of its appeal. Considering the present economic status of the oil and gas industry, it is certainly conceivable that certain lessees will

be unable to obtain these bonds.[15]

In addition, not all administrative cases involving royalty payments are initiated by an order from the MMS requiring the payment of additional royalties. Many are initiated by a request for refund made by the lessee who had inadvertently overpaid the royalties due. If the MMS denies the refund, the lessee seeking that refund must follow the administrative procedures pursued by petitioner to obtain that refund. Thus, unless the jurisdictional issues raised by the decision below are resolved, OCS lessees will be required to pursue its appeals of administrative decisions made by the DOI either in the Claims Court or in the district courts, depending upon whether it is seeking a refund of royalties previously paid or whether it had the opportunity to post a bond in lieu of payment during the pendency of its administrative appeal.

CONCLUSION

As demonstrated above, the jurisdictional issues raised by the decision below pertaining to the relationship between the Tucker Act and the OCSLA have immediate and lasting important consequences. Although petitioner has been unable to quantify the number of cases involving royalty refunds that have been and will be brought in the U.S. district courts within the appellate jurisdiction of the Fifth Circuit, based on the known fact that the vast majority of OCS production originates offshore the states of Mississippi, Louisiana, and Texas, it believes that the number of cases exceeds those brought in other circuits.

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[15] Petitioner is aware that at least two major oil and gas companies, Placid Oil Company and Texaco Inc., are in bankruptcy proceedings, making it extremely difficult for those companies to obtain a bond at a reasonable cost.

Consequently, the decision below, absent review by this Court, effectively resolves these important jurisdictional issues. Because of the importance of these issues and because Amoco Production Company believes the decision below to be incorrect, it respectfully requests that its Petition for Writ of Certiorari to the Fifth Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing petition has been served on all parties by placing copies in the United States mail, properly addressed and postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530, and The Solicitor, Department of Interior, C Street (between 18th & 19th streets) N.W., Washington, D.C. 20240, on the 27th day of August, 1987.

_____

Gene W. Lafitte

APPENDIX A

United States Court of Appeals
For The Fifth Circuit

No. 86-4168

D.C. Docket No. CV84-0916

AMOCO PRODUCTION COMPANY,
Plaintiff-Appellant,

versus

DONALD P. HODEL, Secretary of
Department of Interior, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Louisiana

Before BROWN, RANDALL, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

April 29, 1987

ISSUED AS MANDATE: May 21, 1987

APPENDIX B

AMOCO PRODUCTION COMPANY,
Plaintiff-Appellant,

v.

Donald P. HODEL, Secretary of
Department of the Interior, et al.,
Defendants-Appellees.

No. 86-4168.

United States Court of Appeals,
Fifth Circuit.

April 29, 1987.

This case concerns a dispute over the valuation of royalties due the federal government from a gas lease on the Outer Continental Shelf. In the district court, the plaintiff, Amoco Production Company ("Amoco"), having exhausted its administrative remedies, sought declaratory and injunctive relief from a decision of the Interior Board of Land Appeals ("IBLA"), a tribunal of the Department of the Interior ("DOI"), affirming the DOI's assessment of extra royalties and penalties due for gas produced and sold by Amoco from a lease off the Louisiana shore. The government moved to dismiss the case for lack of subject-matter jurisdiction on the ground that Amoco's claim was actually a disguised claim for a money judgment in excess of $10,000 and that therefore, jurisdiction properly lay in the Claims Court under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) & 1491(a). The district court refused to dismiss, but held for the government on the merits, affirming the result reached by the IBLA while disagreeing with its reasoning. Finding that the district court did not have subject-matter jurisdiction over this case, we vacate the judgment of the district court and remand to the district court with instructions to transfer this action to the Claims Court.

I.

The Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA") authorizes the Secretary of the Interior ("Secretary") to grant leases to private individuals or companies for the recovery of oil and gas from the Outer Continental Shelf. *See* 43 U.S.C. §§ 1331 & 1337. It requires that leasing activities "be conducted to assure receipt of fair market value for the lands leased and the rights conveyed by the Federal Government." 43 U.S.C. § 1344(a)(4). Pursuant to the OCSLA, the DOI has issued regulations to provide guidance in valuing natural gas.

In December, 1974, the government granted Amoco a lease, OCS-G 2866, to extract oil or natural gas from Block 23 of the Vermilion area, off the coast of Louisiana. The lease provided the government a "royalty of 16-⅔ percent in amount or value of production saved, removed, or sold from the leased area." Amoco used the gas extracted under the Vermilion lease to meet its obligations under a warranty contract executed with Florida Power and Light Company ("FP&L") nine years earlier.[1]

In 1977, Amoco requested a valuation determination letter from the Minerals Management Service ("MMS") stating how royalties from the lease were to be calculated. The departmental regulation in effect at the time of the disputed valuation required that the value of production for computing royalties be the "estimated reasonable value" of the product. 30 C.F.R. § 250.64

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[1] Under the 1965 warranty contract, FP&L enjoyed very low prices. During the period of time relevant to this litigation, FP&L paid Amoco $0.2125/mcf.

(1977).[2] It defined reasonable value as "value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated." *Id.* In 1979, Congress revised 30 C.F.R. Pt. 250. The amended version of 30 C.F.R. § 250.64 specifies "regulated prices" as a factor to be considered in determining the value to be used in the computation of royalties. 44 Fed.Reg. 61903 (1979).[3]

The MMS' letter placed a value on gas from the Vermilion lease at a price exceeding $1.50 per thousand cubic feet. This price was determined in accordance with FPC Opinion No. 770-A.1, interpreting 30 C.F.R. § 250.64, which established "just and reasonable" rates applicable to

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[2] 30 C.F.R. § 250.64 (1977) stated:

> The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

[3] The revised 30 C.F.R. § 250.64 (1979) read:

> The value of production shall never be less than the fair market value. The value used in the computation of royalty shall be determined by the Director. In establishing the value, the Director shall consider:

the sale of natural gas in interstate commerce. Under this valuation, the royalty due the government from the lease, $0.25 per thousand cubic feet, was greater than the total amount received by Amoco from FP & L, $0.2125 per thousand cubic feet. Amoco did not appeal the valuation placed on the gas by the MMS.

In 1978, Congress passed the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3301 *et seq.*, regulating the price of natural gas. The NGPA became effective on December 1, 1978.

In July, 1982, following an audit, the MMS informed Amoco that Amoco's computation of royalties from the Vermilion lease for February, 1977, through February, 1979, fell $10,424,298.62 short of the royalties due under the 1977 determination letter, largely because Amoco had used its FP & L contract price, instead of the MMS' valuation determination letter, in its computations. The MMS also notified Amoco that it would add late payment charges which amounted to $3,920,015.52.

Amoco paid the assessed royalties and late charges and subsequently appealed both assessments to the MMS. Amoco conceded that it underpaid royalties due the government for gas from the Vermilion lease for the period

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(footnote 3 continued)

(a) The highest price paid for a part or for a majority of like-quality products produced from the field or area: (b) the price received by the lessee: (c) posted prices: (d) regulated prices: and (e) other relevant matters. Under no circumstances shall the value of production be less than the gross proceeds accruing to the lessee from the disposition of the produced substances or less than the value computed on the reasonable unit value established by the Secretary.

44 Fed.Reg. 61903 (1979).

prior to the NGPA pricing regulations. It asserted, however, that after December 1, 1978, the price of gas from the lease was subject to regulation under § 105 of the NGPA, 15 U.S.C. § 3315. This section states, in relevant part:

> (a) Application.—The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, *sold under any existing contract* or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978.
> (b) Maximum lawful price—
>
> (1) General rule.—. . . [T]he maximum lawful price under this section shall be the lower of—
>
> (A) the price under the terms of the existing contract, *to which such natural gas was subject* on November 9, 1978, as such contract in effect on such date;
>
> (B) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title (relating to new natural gas).

15 U.S.C. § 3315 (emphasis added). Amoco argued that the gas it sold from the Vermilion lease to FP & L under its warranty contract was subject to that existing warranty contract. Thus the maximum lawful price that Amoco could charge for the gas was the $0.2125 per thousand cubic feet it was receiving from FP & L on November 9, 1978. Not only did section 105 of the NGPA make the warranty contract price a ceiling price, but it also created a ceiling for valuation for royalty purposes according to Amoco. The government's valuation of the gas at more than $1.50 per thousand cubic feet, resulting in a royalty greater than

the total amount Amoco was receiving on its contract, was, therefore, arbitrary and resulted in a denial of due process under the fifth amendment.[4]

The government argued, and the MMS found, that the gas from the Vermilion lease was not subject to Amoco's warranty contract with FP & L. That contract did not obligate Amoco to sell the gas from the Vermilion lease to FP & L; the contract could have been satisfied with gas from any source; and Amoco could have sold the gas from the lease to another purchaser. The MMS drew a distinction between warranty contracts and dedication contracts, under which gas from the particular source must go to satisfy a particular contract. It found that section 105 might properly apply to the latter but not to the former. The Director of the MMS therefore affirmed the assessments. Amoco appealed that decision to the IBLA. The IBLA affirmed the decision of the MMS. *See* 78 IBLA 93 (1983).

Having exhausted its administrative remedies, Amoco filed a Notice of Violation of the OCSLA and subsequently appealed the IBLA's decision to the federal district court. Amoco alleged that the district court had jurisdiction over the action under section 23(b)(1) of the OCSLA, 43 U.S.C. § 1349(b)(1), and also under 28 U.S.C. §§ 1331 (federal question) and 1337 (commerce). The DOI filed a motion to dismiss for lack of subject-matter jurisdiction, asserting that Amoco's claim was a disguised claim for money damages and therefore, that exclusive jurisdiction lay in the Claims Court under the Tucker Act, 28 U.S.C.

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4. In its action before the MMS and the IBLA, Amoco also argued that the 1977 valuation letter was superseded by Notice of Lessees 78-2, effective July 1, 1978, which established a valuation consistent with the payments made by Amoco. Amoco has abandoned that claim. The principal sum still at issue therefore amounts to only $3,047,692 of the $10,424,298 assessed by the DOI as an additional royalty, together with apportioned late fees and interest.

§§ 1346 & 1491(a). The district court denied the DOI's motion to dismiss for lack of jurisdiction. The parties then filed cross-motions for summary judgment and the district court granted the defendant's motion. The court found that, since Amoco was selling gas from the Vermilion lease to FP & L on November 9, 1978, the gas was sold subject to that contract. Thus the ceiling price established by section 105 applied. Nevertheless, the price ceiling did not preclude the MMS' establishing a value for the gas in excess of that ceiling, since the value was established well before the controls took effect. The district court thus affirmed the IBLA's result while rejecting its reasoning. *See* 627 F.Supp. 1375 (W.D.La.1986). This appeal followed.

On appeal, the government raises anew its argument that the district court did not have subject-matter jurisdiction over this case. As it did in its motion to dismiss to the district court, the government contends that Amoco's claim is actually a disguised claim for a money judgment and therefore, that jurisdiction lies in the Claims Court, or in the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over appeals from the Claims Court and over district court decisions based in whole or in part on 28 U.S.C. § 1346. *See* 28 U.S.C. § 1295(a)(2)-(a)(3). Since the question of subject-matter jurisdiction is a threshold question that must be addressed in order to determine whether we can proceed to the merits of the case, we turn to it first.

II.

The government argues that this action is a suit to obtain monies from the United States, the claim exceeds

$10,000, the claim is founded upon a federal statute (unspecified),[5] and the claim would expend itself on the public treasury. A suit of this character, argues the government, can be brought only pursuant to the Tucker Act under which exclusive jurisdiction lies in the Claims Court. In support of this conclusion the government points out *Foote Mineral Co. v. United States*, 654 F.2d 81 (Ct.Cl.1981), a case that the government describes as similar to the instant case that was heard in the Claims Court.

The government contends that the fact that Amoco's complaint does not directly ask for money judgment or name the United States as a defendant does not control. According to the government, jurisdiction is vested exclusively in the Claims Court because Amoco's "primary objective" is to recover money allegedly wrongfully

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5. In its memorandum in support of its motion to dismiss, the government described the suit as a "contract" claim, noting that Amoco and the MMS are parties to lease contracts and that Amoco has paid certain funds to the MMS that it contends are not owed and that should be returned to Amoco if Amoco's position is correct. Amoco, in its response to the government's motion to dismiss, disputed the classification of the claim as a contractual claim. According to Amoco, "the existence of a contract lurking in the background of a legal claim [does not] require[ ] classification of that claim as one of the contract." Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss at 6. In Amoco's view, the claim is a non-contractual claim based upon statutory, regulatory and constitutional provisions. In its reply to Amoco's response to its motion to dismiss, the government appears to have retreated from its characterization of the claim as a contractual claim, noting, correctly, that "[a]s Amoco itself acknowledges . . . exclusive Tucker Act jurisdiction is not limited to contract claims." Defendants' Reply Memorandum in Support of Motion to Dismiss at 3 n 2. However, during oral argument to this court, counsel for the government again discussed the "contractual" nature of this action.

As we explain in our discussion *infra* at III(B), whether this action is a claim founded on a contract or one founded on a statute or regulation is not significant in the instant case and we do not attempt to resolve the question.

withheld by the government. *See Portsmouth Redevelopment & Housing Auth. v. Pierce,* 706 F.2d 471, 474 (4th Cir.), *cert. denied,* 464 U.S. 960, 104 S.Ct. 392, 78 L.Ed.2d 336 (1983). The government cites a Fifth Circuit case, *Warner v. Cox,* 487 F.2d 1301 (5th Cir. 1974), as support for Tucker Act jurisdiction in this case, and distinguishes a Tenth Circuit decision that the *Warner* court had distinguished from the case before it.

In response to Amoco's contention that Amoco's purpose in this action goes far beyond any eventual claim for a refund, the government identifies the jurisdictional scheme set up by Congress—to centralize money claims against the government in the Claims Court except those claims under $10,000 or those sounding in tort—and contends that this scheme cannot be defeated by a party's demand for "more" than monetary relief when monetary relief would fully satisfy the party's claims. In this case, argues the government, Amoco's requests for declaratory and injunctive relief are not, notwithstanding Amoco's contentions, "urgent and essential." A money judgment in Amoco's favor by the Claims Court would, for all practical purposes, accomplish Amoco's litigation aims. To the extent that the Claims Court were to award monies to Amoco in this case, the award would be based on legal reasoning which would stand as *stare decisis.* The government points out that Amoco is no different from other corporations engaged in disputes with the government—disputes of this kind are often not confined to a single episode. Finally, the government argues that Amoco can, in fact, obtain suitable remand relief from the Claims Court if that court were persuaded that such relief was appropriate. *See* 28 U.S.C. § 1491.

Countering the government's allegation that the district court lacked subject-matter jurisdiction over this case, Amoco argues that the fact that it seeks equitable

relief rather than money damages is evident from the face of the pleadings. Amoco notes that it does not seek a money judgment and, in fact, no court could render a money judgment since the record is incomplete and would not permit a court to compute the amount of any money that might be due if Amoco prevailed in the appeal.

Also, while Amoco concedes that it may obtain a refund through the refund procedure provided in section 10 of the OCSLA, 43 U.S.C. § 1339,[6] if it obtains a favorable

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6. The OCSLA's refund provision, found at 43 U.S.C. § 1339, provides:

> (a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person had made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953. The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.
>
> (b) No refund of or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for transmittal to the appropriate legislative committee of each body, respectively: *Provided*, That if the Congress shall not be in session on the date of such submission or shall adjourn prior to the expiration of thirty days from the date of such submission, then such payment or credit shall not be made until thirty days after the opening day of the next succeeding session of Congress.

43 U.S.C. § 1339.

ruling, Amoco contends that its aim in this action goes beyond any eventual claim for a refund. Amoco argues that the DOI's error in valuing the gas for royalty purposes will be perpetuated in future audits concerning this lease (and other leases) if the error is not corrected by a court with jurisdiction to do so. Therefore, to obtain a declaratory judgment establishing that the DOI's valuation is improper in order to prevent erroneous assessment as well as to establish Amoco's right to a refund is the main purpose of this lawsuit. Additionally, Amoco argues that it requires an injunction against future use of the DOI's "erroneous" ruling. Finally, Amoco contends that the remand to the DOI for a recalculation of Amoco's royalty obligations will facilitate a subsequent administrative refund request. In summary, Amoco argues that the declaratory and injunctive relief is "urgent and essential," and is unavailable in the Claims Court. In response to the government's argument that Amoco does not need declaratory or injunctive relief, Amoco says that the government overstates the effect of *stare decisis* since *stare decisis* applies only to the holding of a case, not to the legal reasoning, and because the doctrine has no effect on an administrative tribunal such as the IBLA.

Amoco argues that *Sarasota, Fla. v. EPA*, 799 F.2d 674 (11th Cir. 1986), a case involving judicial review of the EPA's refusal to give the city of Sarasota federal grant funds, is directly analogous and supports the conclusion

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(footnote 6 continued)

According to Amoco, "[a] final judgment upholding Amoco's position as to the proper valuation of the gas that was subject to the DOI's audit can be expected to 'satisfy' the Secretary that an overpayment had been made, in the amount to be calculated upon remand." Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss at 10.

that the federal district court had jurisdiction over this case. According to Amoco, the result in *Sarasota* was based on the fact that "the best Sarasota can hope for in this litigation is a remand to EPA with instructions to reconsider the application," *id.* at 680-81 (footnote omitted), and similarly, all Amoco seeks is a remand to the DOI. Indeed, notes Amoco, if this court were to determine, as a matter of law, that the Secretary cannot establish a royalty value under the OCSLA that exceeds the maximum lawful price at which the gas could be sold, then a remand to the IBLA would be necessary to determine what portion of the royalties were overpayments and for the DOI to initiate the refund process provided in the OCSLA.

III.

The Tucker Act, 28 U.S.C. § 1346(a)(2) & 1491(a), vests concurrent jurisdiction in the Claims Court[7] and the federal district court over any "claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). If the claim exceeds $10,000, the Tucker Act grants exclusive jurisdiction to the Claims Court. 28 U.S.C. § 1491(a)(1). Because adjudication in a federal district court of a lawsuit that falls within the exclusive jurisdiction of the Claims Court would seriously undermine the purposes behind the Tucker Act, courts confronting the issue have

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[7] The Claims Court, established by the Federal Courts Improvement Act of 1982, P.L. No. 97-164, 96 Stat. 25, inherited the trial jurisdiction of the former Court of Claims. The appellate jurisdiction of the former Court of Claims is now vested in the Court of Appeals for the Federal Circuit. *See, e.g., Hahn v. United States*, 757 F.2d 581, 586 n. 1 (3d Cir. 1985).

consistently held that the Claims Court is the sole forum for the adjudication of such a claim, even though the claim would otherwise fall within the coverage of some other statute conferring jurisdiction on the district court.[8] *Graham v. Henegar,* 640 F.2d 732, 734-35 & n. 6 (5th Cir. 1981) (citing cases from various courts of appeals); *but see, e.g., Bor-Son Bldg. Corp. v. Heller,* 572 F.2d 174, 181-82 & n.14 (8th Cir. 1978)(jurisdiction of Court of Claims over claims against United States in excess of $10,000 is not exclusive.). Therefore, if we find that this suit falls within the exclusive jurisdiction of the Claims Court under the Tucker Act, our inquiry will be at an end; we will not address the possible bases for district court jurisdiction over this case.

[1] We proceed in our analysis of whether the district court had jurisdiction over this case by determining the existence of the three conditions set forth in the Tucker Act which, if satisfied, vest subject matter jurisdiction exclusively in the Claims Court: (1) the action is against the United States; (2) the action is founded upon the Constitution, federal statute, executive regulation, or government contract; and (3) the action seeks monetary relief in excess of $10,000. *See Portsmouth,* 706 F.2d at 473. Since we find the first two conditions clearly to be satisfied in this case, we will address them only briefly. It is the existence of the third condition that is considerably less clear and upon which we focus our attention.

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[8] As the Third Circuit explained, "[t]his is because it is only under the terms of the Tucker Act that the United States waives its sovereign immunity to such claims, and this consent to suit is a jurisdictional prerequisite." *Hahn v. United States,* 757 F.2d 581, 586 (3d Cir. 1985) (citing *United States v. Mitchell,* 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3654, at 156-57 (1976)).

A.

[2] It is well-established that the limitations of the Tucker Act cannot be avoided by failing to name the United States as a defendant. It is not necessary that the United States be named as a party; an action against a federal agency or official will be treated as an action against the sovereign if " 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land v. Dollar,* 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' " *Larson v. Domestic & Foreign Corp.,* [337 U.S. 682,] 704 [69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949)]; *Ex Parte New York,* 256 U.S. 490, 502 [41 S.Ct. 588, 591, 65 L.Ed.2d 1057] (1921). *Dugan v. Rank,* 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed. 2d 15 (1963). This is a suit against a federal agency and federal officials and any monetary judgment recovered would expend itself on the public treasury. Therefore, we construe this action to be one against the United States for purposes of the Tucker Act.

B.

[3] This lawsuit clearly is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491. Assertions have been made at various points in these proceedings that this claim is founded upon a contract. Counter-assertions that this claim is a noncontractual claim based upon statutory, regulatory and constitutional provisions, *see* discussion *supra* at note 5, have also been made. No assertion has been made that this claim is not

founded upon a source of law listed in section 1491, and indeed, no such assertion could legitimately be made. We need not resolve the question of whether this claim is founded upon a contract, or whether it is, instead, founded upon a federal statute, regulation, or the Constitution. In any case, if the claim is for monetary relief in an amount greater than $10,000, exclusive jurisdiction over it lies in the Claims Court. *Cf. Portsmouth*, 706 F.2d at 474-75 ("[T]he Tucker Act gives the Claims Court jurisdiction over actions against the United States founded upon the Constitution, federal statutes, and regulations, as well as upon government contracts. Consequently, the Claims Court is the proper forum for this action, whether it is characterized as one in contract or one to interpret provisions of the Constitution, federal statutes, or regulations pertaining to the contract.").

In this regard, we do note that if the claim is not one founded upon a contract, some further analysis is required to determine whether the non-contractual claim invoking a federal statute, regulation, or the Constitution, is cognizable in the Claims Court.

[4] While the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims against the United States falling within the jurisdiction of the Claims Court under the Tucker Act, *United States v. Mitchell*, 463 U.S. 206, 212-16, 103 S.Ct. 2961, 2965-67, 77 L.Ed.2d 580 (1983), the Tucker Act does not create substantive rights enforceable against the United States for money damages. *Id.* at 216, 103 S.Ct. at 2967; *see also United States v. Testan*, 424 U.S. 392, 398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976). "A substantive right must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.' 28 U.S.C. § 1491." *Mitchell*, 463 U.S. at 216, 103 S.Ct. at 2967. Despite the broad language of

section 1491, not every claim invoking the Constitution, a federal statute or a regulation is cognizable under the Tucker Act; the claim must be one against the United States for money.[9] *See, e.g., id.* (citing *United States v. King*, 395 U.S. 1, 2-3, 80 S.Ct. 1501, 1502, 23 L.Ed2d 52 (1969)); *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1007 (Ct.Cl.1967). Within the sphere of money claims involving or invoking the Constitution, a federal statute, or regulation, the non-contractual claims considered by the Claims Court can be divided into two classes:

> [T]hose in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money or property has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation. In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum. . . . .
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> . . . . Where the claimant is not suing for money

9. The Claims Court also has limited authority to issue declaratory judgments. *See, e.g., Austin v. United States*, 206 Ct.Cl. 719, 723 (declaratory judgments that are "tied and subordinate to a monetary award"), *cert. denied*, 423 U.S. 911, 96 S.Ct. 215, 46 L.Ed.2d 140 (1975); 28 U.S.C. § 1507 (actions under § 7428 of the Internal Revenue Code of 1954). *See* discussion *infra* at III(C).

> improperly exacted or retained (the first class defined above), the historical boundaries of our competence have excluded those instances in which the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant, but in which some other principle of damages has to be invoked for recovery. . . . Under Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.

Eastport, 372 F.2d at 1007-09 (citations omitted); *see Mitchell*, 463 U.S. at 216-17, 103 S.Ct. at 2967-68 (citing *Eastport*); *Testan*, 424 U.S. at 401-02, 96 S.Ct. at 954-55 (citing *Eastport*).

[5] In this case, the requirement that the source of substantive law upon which the claimant relies can fairly be interpreted as mandating compensation by the federal government for the damage sustained presents no obstacle. On the basis of case law dealing with refund statutes, we find section 10 of the OCSLA, 43 U.S.C. § 1339 to be susceptible to fair interpretation as legislation that creates a right to monetary relief against the government, that is, that can fairly be interpreted as mandating compensation by the federal government. *See, e.g., Knight Newspapers, Inc. v. United States*, 395 F.2d 353 (6th Cir. 1968); *Northwest Pubs., Inc. v. United States*, 253 F.Supp. 828 (D.D.C. 1956); *Foote*, 654 F.2d at 84 (citing *United States v. Laughlin*, 249 U.S. 440, 442-43, 39 S.Ct. 340, 341, 63 L.Ed. 696 (1919)).

C.

Turning now to the third condition for exclusive Tucker Act jurisdiction, we note at the outset that the question of whether this action is an action seeking

monetary relief in excess of $10,000 is not susceptible to simple resolution.[10] Rather, we admit up front that this is a "close case" with legitimate arguments to be made for both positions. While we do find that this case is *best* characterized as an action primarily seeking monetary relief (in excess of $10,000) from the United States, with exclusive jurisdiction therefore lying in the Claims Court, we acknowledge the significant counter-arguments and attempt to address them.

[6] Amoco's complaint asks for three types of relief: (1) a declaratory judgment that the IBLA decision is void and ineffective because it is arbitrary, capricious, an abuse of discretion and is illegal and unconstitutional (fifth amendment violation); (2) a remand to the DOI for "proper calculation" of underpaid royalties and interest penalties for late payments; and (3) a permanent injunction against defendants from enforcing or applying the IBLA decision. The pleadings do not, on their face, ask for a money judg-

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10. As an aside, we note that the underlying claim here, or, stated differently, the gravaman of the dispute, is that *Amoco* allegedly *owes* the government money. If Amoco had not paid, the government would have had to pursue Amoco for the royalties and late fees. That clearly would not be Tucker Act claim. *Cf. Price, II v. United States*, 621 F.2d 418, 420 (Ct.Cl.1980) ("To the extent plaintiff seeks a ruling from this court that he does not owe the Government the $1,049.31 of the debt which he says he has not yet repaid, the relief sought is in the nature of a declaratory judgment which the court is not empowered to grant. *United States v. King*, 395 U.S. at 5, 89 S.Ct. at 1503."). Nonetheless, for what seem to be justifiable reasons (i.e. fear of losing the Vermilion lease), Amoco paid the royalties and late fees prior to appealing the assessments and is now in the position of seeking a judgment so that eventually, the money will be returned to it. Why the payment of the royalties and late fees should convert a suit that would clearly not be a Tucker Act suit into one within the exclusive jurisdiction of the Claims Court is not clear. However, as fundamental as this analysis seems, no court that we know of has employed it. Cases in which money has been paid to the government prior to the institution of administrative or judicial proceedings for the purpose of getting a refund are often heard in the Claims Court, notwithstanding the fact that the analysis discussed above would apply.

ment, and thus, might prompt the conclusion that this case *clearly* falls outside the Tucker Act since Amoco does not directly or expressly ask for money from the government. However, in the "murky" area of Tucker Act jurisprudence, *see Sarasota*, 799 F.2d at 679, one of the few clearly established principles is that the substance of the pleadings must prevail over their form. Courts consistently endeavor to "pierce" the pleadings so that artful pleading does not undercut the jurisdiction of the Claims Court (that is, Congress' intent in enacting the Tucker Act). *Cf. Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C.Cir.1982). It is clear, both in this circuit and elsewhere, that a plaintiff cannot avoid Tucker Act jurisdiction simply by characterizing an action as equitable in nature. *See, e.g., Commonwealth of Massachusetts v. Departmental Grant Appeals Bd.*, — F.2d —, — Nos. 82-1403, 86-1064, slip op. at 11 (1st Cir. March 30, 1987); *Portsmouth*, 706 F.2d at 474; *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 823-24 (10th Cir. 1981); *Bakersfield City School Dist. v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979); *American Science & Engineering, Inc. v. Califano*, 571 F.2d 58, 61-62 (1st Cir.1978); *Alabama Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1228-30 (5th Cir. 1976); *Warner*, 487 F.2d at 1305; *Hoopa Valley Tribe v. United States*, 596 F.2d 435, 436, 443, 445-46 (Ct. Cl.1979). "[W]here the real effort of the complaining party is to obtain money from the federal government, the exclusive jurisdiction of the [Claims Court]. . . cannot be evaded or avoided by framing a district court complaint to appear to seek only injunctive, mandatory or declaratory relief against government officials or the government itself." *Bakersfield*, 610 F.2d at 628; *see, e.g., Amalgamated Sugar*, 664 F.2d at 824; *S. J. Groves & Sons v. United States*, 495 F.Supp. 201, 208-09 (D.Colo.1980) (citing numerous authorities).

While this basic principle seems straightforward in the abstract, its application is difficult and subject to con-

siderable manipulation, in all but the most clear-cut cases. Courts addressing the Tucker Act question in the numerous cases raising the issue have employed a variety of approaches to the problem and have used varied language to describe their inquiries. *See, e.g., United States v. City of Kansas City, Kansas,* 761 F.2d 605, 608 (10th Cir. 1985) ("ultimate aim"); *Hahn v. United States,* 757 F.2d 581, 590 (3d Cir. 1985) (" '[i]f the declaratory or injunctive relief a claimant seeks has significant prospective effect or considerable value apart from merely determining monetary liability of the government, . . . the district court may assume jurisdiction over the nonmonetary claims.' ") (quoting *Minnesota by Noot v. Heckler,* 718 F.2d 852, 858 (8th Cir. 1983)); *Portsmouth,* 706 F.2d at 474 ("primary objective"); *Rowe v. United States,* 633 F.2d 799, 802 (9th Cir. 1980) (Claims Court jurisdiction cannot be avoided when "actual relief resulting from the agency review would be monetary") (citing *Lee v. Blumenthal,* 588 F.2d 1281, 1283 (9th Cir. 1979)), *cert. denied,* 451 U.S. 970, 101 S.Ct. 2047, 68 L.Ed.2d 349 (1981); *Warner,* 487 F.2d at 1305 ("where the only purpose and sole effect of permitting [review of improper agency action in refusing deferred payment agreement] in the district court is what amounts to a money judgment against the United States," district court lacks jurisdiction); *Alan Guttmacher Inst. v. McPherson,* 597 F.Supp. 1530, 1543 (S.D.N.Y. 1984) ("primary objective"); *Heart of the Valley Metro. Sewerage Dist. v. EPA,* 532 F.Supp. 314, 317 (E.D.Wis. 1981) ("keystone of this action;" "prime effort"); *Hoopa Valley,* 596 F.2d at 436-37 ("prime effort;" "direct impact"); *see also Gibson v. Block,* 619 F.Supp. 1572, 1575 (N.D.Ind. 1985) (surveying the "different formulae [that] exist to test the essence of the plaintiff's claim.").

[7] Without attempting to synthesize the intricacies of these various approaches, we can confidently state that, as a general matter, the fundamental inquiry being per-

formed is a search for the "essence" of the claim. In passing on Tucker Act questions, courts undertake to discern the nature of the relief being sought and focus on the type of relief that will result from the action in determining whether the suit falls within the Tucker Act. Proceeding in our analysis along these lines, we find that this case falls within the exclusive jurisdiction of the Claims Court.[11] In this case, we believe that Amoco seeks, as its "primary objective" or "ultimate aim," *see, e.g., Portsmouth,* 706 F.2d at 474; *City of Kansas City,* 761 F.2d at 608; *Hoopa Valley,* 596 F.2d at 436, the return of some of the money it has paid the government for assessed royalties and late fees. Additionally, the actual relief resulting from the agency review would be monetary. *See Rowe,* 633 F.2d at 802. Indeed, Amoco conceded at oral argument and in its briefs to this court and the district court both that it does seek the eventual return of its money and that money would "flow from," or be the "natural consequence" of, a determination that the DOI improperly valued the gas for royalty purposes. We also find that the injunctive and declaratory relief Amoco seeks does not have a significant prospective effect or considerable value apart from determining that the government owes Amoco money. *See Hahn,* 757 F.2d at 590.

Support for the conclusion that Amoco's suit falls within the Tucker Act is found in this court's decision in *Warner v. Cox, supra.* In *Warner,* a defense contractor brought suit against the Secretary of the Navy seeking reversal of an administrative determination requiring the contractor to repay the Navy approximately $55 million paid by the Navy under a contract. The district court found

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11. We note that in *Warner,* this court commented that its analysis "commences and virtually ends with analysis and characterization of Litton's claim and of the relief Litton seeks and has received from the district court. Once this claim is properly identified, the rest becomes plain." *Warner,* 487 F.2d at 1303-04.

in favor of the contractor and entered an injunction restraining the Secretary of the Navy from recouping the $55 million by refusing to make further payments on the contract. This court reversed, finding that the claim was a suit against the United States within the exclusive jurisdiction of the Court of Claims (now, the Claims Court). This court found that the judgment against the Secretary would expend itself on the public treasury and would compel the government to pay money in advance of the time specified in its contract, "money which it conceivably might never otherwise have to pay at all." *Warner*, 487 F.2d at 1303. The court concluded that the Administrative Procedure Act could not be invoked as a grant of jurisdiction to the district court for the suit before it, which it labeled as "a contract suit against the United States solely designed to force the sovereign to pay vast sums at a time in advance of its undertaking." *Id.* at 1305. The court stated:

> We recognize the force of Litton's contrary characterization of the case as one in which only review of improper agency action in refusing a deferred payment agreement is sought, action arguably not otherwise reviewable in any court. But we are persuaded that, *where the only purpose and sole effect* of permitting such a review in the district court is what amounts to a money judgment against the United States vastly exceeding that court's Tucker Act jurisdiction, implemented by equitable powers which neither the Court of Claims nor the district court itself sitting as a Court of Claims under the Tucker Act could exercise in such a case, the district court is exercising jurisdiction which Congress never intended to and never did confer upon it.

Id. (footnote omitted) (emphasis added). The court further noted that:

> Congress established the Court of Claims to determine claims of this type and magnitude but deliberately withheld equitable powers from it. Since the United States by reason of its nature acts only through agents, it is hard to conceive of a claim falling no matter how squarely within the Tucker Act which could not be urged to involve as well agency error subject to review under the APA. Little imagination is needed to foresee the consequences of a holding that such claims as this may be reviewed either in a court having power to grant equitable relief against the United States or in one having none. We refuse to believe that Congress intended, in enacting the APA, so to destroy the Court of Claims by implication.

Id. at 1306. The court did recognize, however, that "[s]ituations may well arise in which the district court has and should exercise jurisdiction, grounded in some statute other than the Tucker Act, to grant injunctive relief having the incidental effect of requiring payments to be made by the United States." *Id.* at 1305. As an example, the court cited *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971).

In *National Helium*, the Secretary of the Interior terminated a helium purchasing contract without complying with the National Environmental Policy Act requirement that he consider the environmental consequences of his actions and make a statement of their impact. The effect of the contract termination would have been to cause the release of unseparated helium into the atmosphere as the natural gas which it accompanied was burned. The Tenth Circuit found that the district court had jurisdiction over the suit and affirmed the district court's issuance of an injunction against the Secretary prohibiting the contract termination. The case was remanded to the Secretary to meet the environmental requirements. An "incidental" effect

of the remand was that during the period of the remand, the contract remained in force and the government was obligated to perform its contractual obligations to purchase helium. *See Warner*, 487 F.2d at 1306.

The *Warner* court, distinguishing *National Helium* from the case before it, stated that "fairly and centrally presented in *National Helium* was a national policy having no necessary connection with the payment of money." *Warner*, 487 F.2d at 1306. In *Warner*, unlike in *National Helium*, "the sole congressional policy involved [was] purely monetary." *Id.* We believe that the suit before us is, no less than *Warner* and unlike *National Helium*, a suit which is "necessarily connected" with the payment of money. The payment of money by the government cannot be said to be an "incidental" effect in this case.

While it does not address the question of "disguised" money claims under the Tucker Act, the case of *Foote Mineral Co. v. United States*, 654 F.2d 81 (Ct.Cl. 1981), is nonetheless worthy of mention in this discussion of the proper characterization of Amoco's claim. *Foote* is a case factually similar to the instant case which was heard by the Court of Claims. The court reviewed a decision by the IBLA adverse to the plaintiff on a claim for a refund of royalties paid to the United States and upheld the government's counterclaim for additional royalties. Foote Mineral held leases for mining potassium and sodium on federal lands in Nevada. The leases gave Foote Mineral the right to mine subject to the payment of a royalty to the United States. Under the leases, royalties were to be paid on "leased" minerals but not on "located" minerals. A prerequisite to the issuance of the leases was that the lands mined contain valuable deposits of potassium and sodium. The leases contained recitals that the lands did contain such deposits. Foote Mineral was interested in mining lithium, however, and considered potassium and sodium con-

taminants. Foote Mineral actually produced lithium from the mines and paid royalties on it. The United States Geological Survey ("USGS"), which administered the leases, however, requested higher royalty payments, whereupon Foote Mineral reviewed the question of whether lithium was a leased or a located mineral. It concluded that lithium was located and thus, that no royalties were due at all. It then appealed the USGS decision and, in that appeal, sought a refund of all royalties previously paid. The refund was sought under 43 U.S.C. § 1734(c),[12] a statute very similar to the refund statute at issue in Amoco's case, 43 U.S.C. §1339. *See supra* note 6. The Director of the USGS ruled against Foote Mineral. Foote Mineral then appealed to the IBLA, which also ruled against it without an evidentiary hearing.

Foote Mineral, having exhausted its administrative remedies, sought review of the IBLA's decision in the Court of Claims. The Court of Claims set aside the IBLA decision for procedural error in not holding an evidentiary hearing on the disputed facts. The court then granted summary judgment for Foote Mineral, holding that the leases were invalid because valuable deposits of sodium and potassium did not exist at the mines when the leases were issued. The court determined that Foote Mineral was entitled to recover the royalties paid.

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[12] Section 1734(c) provides:

> In any case where it shall appear to the satisfaction of the Secretary that any person has made a payment under any statute relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds. 43 U.S.C. § 1734(c).

As this discussion illustrates, *Foote* resembles the instant case and it is interesting to note that it was heard in the Court of Claims. Of course, we must recognize that there was no question but that the plaintiff in *Foote* was seeking money from the government. Foote Mineral came into the Court of Claims under a refund statute and did not allege in its complaint that it sought declaratory or injunctive relief as Amoco has done in this case.[13] We mention *Foote,* however, because the government's claim in this case essentially boils down to an allegation that Amoco, in actuality, seeks exactly what Foote Mineral sought in *Foote.*[14]

Amoco argues that it did not, indeed, could not, ask for a money judgment in this action. Amoco makes much of the fact that it seeks from the district court a declaratory

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[13] Amoco points out that 43 U.S.C. § 1339 provides the mechanism for the DOI to effect repayment to Amoco of any excess over the amount Amoco was lawfully required to pay, which repayment is required by that section of the OCSLA. This repayment mechanism is, according to Amoco, an important distinguishing feature between the instant case and *Foote.* Amoco notes that *Foote* was brought pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.,* which contains no "mechanism" for the recovery of excess royalties erroneously extracted by the DOI. Consequently, according to Amoco, to recover royalties, a plaintiff would have to seek a money judgment from the appropriate court. We find this "distinction" to be one without a difference and to have no bearing on the relevancy of *Foote* to the case before us.

[14] It is also important to note that Amoco has cited us to several cases, also resembling the instant case, that have been heard in district courts. *See Marathon Oil Co. v. Kleppe,* 556 F.2d 982 (10th Cir. 1977); *Amoco Prod. Co. v. Andrus,* 527 F.Supp. 790 (E.D. La.1981); *Gulf Oil Corp. v. Andrus,* 460 F.Supp. 15 (C.D. Cal. 1978); *Marathon Oil Co. v. Andrus,* 452 F.Supp. 548 (D. Wyo. 1978); *Standard Oil Co. v. Hickel,* 317 F.Supp. 1192 (D. Alaska 1970), *aff'd,* 450 F.2d 493 (9th Cir. 1971); *Pan Am. Petroleum Corp. v. Udall,* 192 F.Supp. 626 (D.D.C. 1961); *California Co. v. Seaton,* 187 F.Supp. 445 (D.D.C. 1960), *aff'd,* 111 U.S. App. D.C. 262, 296 F.2d 384 (1961). The district courts hearing those cases did not address the question of possible Tucker Act jurisdiction.

judgment, injunctive relief, and a remand to the DOI with instructions to recalculate the royalties. Amoco stresses that once the district court has afforded such relief, the refund will come, not through a court, but rather, through the refund procedure set forth in the OCSLA. Amoco views this dichotomy as establishing conclusively that this suit is not a suit to obtain money from the government.

We are not persuaded by Amoco's argument that this dichotomy is conclusive evidence of the fact that this is not a Tucker Act suit. As we see it, Amoco is simply doing what it must *in order to get its money.* Indeed, as Amoco itself acknowledges, proceeding in this way and getting a judgment in its favor will assure it the return of its money. We attach great significance to the fact that it appears (both from the statute and from the representations made by both Amoco and the government at oral argument) that, armed with a declaration that the DOI improperly valued the gas for royalty purposes, and after the recalculation upon remand, the refund process will be instituted and a refund will be forthcoming.[15]

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[15] We note, in particular, a colloquy between this court and counsel for Amoco that occurred during oral argument on this appeal. A member of the panel asked counsel for Amoco whether, if this court were to find for Amoco on the merits, the administrator could reach any decision other than that Amoco should be entitled to a refund. Counsel for Amoco responded:

> I think that he would have to, as a matter of law, agree that our royalty obligation could not exceed the maximum lawful price at which this gas could be sold and that he would recalculate the royalties owed and that a section 10 proceeding would be initiated for the repayment of overpaid royalties.

Following up, the panel member asked if the administrator would have, under the law, the basis for doing anything other than giving Amoco its money back. In response, counsel for Amoco stated that "[r]ecalculation of the royalties would be a natural consequence." Amoco went on to emphasize, however, that the relief it seeks has to do also with future royalty obligations.

We do, of course, recognize the principle that while "a claimant may not avoid the exclusive jurisdiction of the [Claims Court] merely by framing a complaint to seek nonmonetary relief when the result would be the equivalent of obtaining money damages . . . neither does the [Claims Court] possess exclusive jurisdiction simply because a suit for nonmonetary relief may form the basis for a later money judgment." *Tennessee ex rel. Leech v. Dole*, 749 F.2d 331, 336 (6th Cir. 1984) (citation omitted), *cert. denied*, 472 U.S. 1018, 105 S.Ct. 3480, 87 L.Ed.2d 615 (1985); *see also Commonwealth of Massachusetts*, at ____; *Hahn*, 757 F.2d at 589; *Minnesota by Noot v. Heckler*, 718 F.2d 852, 858 (8th Cir. 1983); *Laguna Hermosa*, 643 F.2d at 1379. The case of *Sarasota, Fla. v. EPA*, 799 F.2d 674 (11th Cir. 1986), espousing that principle, is cited to us by Amoco as support for its position that the district court had subject-matter jurisdiction over this case.

In *Sarasota*, the city of Sarasota challenged the criteria under which its application for federal grant funds was re-

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(footnote 15 continued)

Additionally, we note that Amoco, describing the refund process, has stated:

> Under Section 1339 of Title 43 the DOI is in fact required to repay to Amoco any excess over the amount Amoco was lawfully required to pay. Such repayment is mandated "when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay . . . ." 43 U.S.C. § 1339. A final judgment upholding Amoco's position as to the proper valuation of the gas that was subject to the DOI's audit can be expected to "satisfy" the Secretary that an overpayment had been made, in the amount to be calculated upon remand.

Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss at 9-10.

jected. The district court found that the city's "ultimate goal" was to receive grant funding and therefore, that jurisdiction lay in the Claims Court. On appeal, the Eleventh Circuit reversed, finding that, under the present posture of the grant process, the city's claims could not be classified as money claims as that term is understood in Tucker Act jurisprudence. *See id.* at 680. The court came to that conclusion notwithstanding its recognition that "[u]ndoubtedly, Sarasota ultimately seeks money as the end product of the grant process." *Id.* The court noted that "the fact that Sarasota's victory on its present claim, if it occurs, may advance it along the path to the grant funding that it covets does not automatically transform every intervening controversy into a Tucker Act claim." *Id.* at 681.

We are urged to find that the district court had jurisdiction over this case because, as in *Sarasota*, the fact that a victory for Amoco in the district court may advance Amoco along the path to a refund does not automatically transform the instant controversy into a Tucker Act claim. While we recognize that the controversy is not *automatically* transformed because money may lurk in the background, we must disagree with the ultimate conclusion that the claim in this case does not fall within the Tucker Act.

The way in which the sound principles set forth by the *Sarasota* court were applied by that court supports the proposition that jurisdiction over the instant case lay properly in the Claims Court instead of the federal district court. The court in *Sarasota* stressed that, while the city of Sarasota ultimately sought money as the end product of the grant process,

> even if Sarasota can persuade a court of competent jurisdiction that EPA has impermissibly

> promulgated regulations and applied them to Sarasota's application, the best Sarasota can hope for in this litigation is a remand to EPA with instructions to reconsider the application. Resolution of the present controversy will not entitle Sarasota to federal grant funds nor even provide Sarasota with a declaration that Sarasota would be entitled to grant funds if the remaining steps in the grant process, such as preparation of an environmental assessment, are completed to EPA's satisfaction.

Id. at 680-81. We attach great significance to the court's notation that the best Sarasota could hope for in the district court litigation was a remand to EPA with instructions to reconsider the grant application. We attach still greater significance to the court's comment that resolution of that controversy would not entitle Sarasota to federal grant funds or even provide Sarasota with a declaration that Sarasota would be entitled to grant funds if the remaining steps in the grant process were completed to EPA's satisfaction. We note a similar analysis employed by the district court in *Guttmacher:*

> The plaintiffs' primary objective in this action is the unbiased and lawful consideration of their request for money.... [T]hey ultimately seek money, but they appear willing to pursue that money through administrative procedures so long as those procedures are lawful. What they seek from the Court is assurance that they will be.
>
> Examination of those actions cited above which were declared solely within the jurisdiction of the Claims Court demonstrates that those

> plaintiffs were seeking only a declaration of their absolute right to a money judgment—in effect, they were seeking an award of money. In this action, by contrast . . . plaintiffs acknowledge that they have no absolute right to money. They do not seek a declaration from the Court that they are entitled to the grant. They seek only to prevent their request for money from being improperly considered by the agency.

Guttmacher, 597 F.Supp. at 1543. This distinction between a declaration of rights that will certainly result in money (within Claims Court jurisdiction) and a declaration of rights which may or may not result in subsequent payments outside the court's process (within the district court's jurisdiction), was also noted by the Court of Claims in *Pauley Petroleum, Inc. v. United States,* 591 F.2d 1308, 1315, 219 Ct.Cl. 24, *cert. denied,* 444 U.S. 898, 100 S.Ct. 206, 62 L.Ed.2d 133 (1979).

Because judgment in Amoco's favor *will* result in the payment to Amoco of more than $10,000 by the government, we believe that Amoco's case fits better into the former category, for which jurisdiction resides in the Claims Court. Additionally, that the actual disbursement of government funds would not occur until after the remand to the DOI and the institution of the refund procedure does not alter our conclusion that this is a Tucker Act claim.

Turning next to Amoco's contention that its purpose in this lawsuit goes beyond any eventual claim for monetary relief, we find the argument to be neither persuasive nor dispositive. We acknowledge that the declaratory and injunctive relief Amoco requests would not be available in the Claims Court. That court is a court

of limited jurisdiction. *See, e.g., Testan,* 424 U.S. at 398, 96 S.Ct. at 953; *Richardson v. Morris,* 409 U.S. 464, 465-66, 93 S.Ct. 629, 630, 34 L.Ed.2d 647 (1973) (per curiam); *King,* 395 U.S. at 5, 89 S.Ct. at 1503; *American Science & Eng'g,* 571 F.2d at 62.

First, we are not persuaded that Amoco actually needs the declaratory and injunctive relief that it says is "urgent and essential." Amoco's concerns about future audits on the Vermilion lease at issue in this case and about audits on other leases are answered by the doctrines of *stare decisis* and res judicata and, to a lesser extent, by practical considerations as well. *Cf. Foote,* 654 F.2d at 88 (denying declaratory judgment that plaintiff owes no royalties in the future as beyond the power of the Court of Claims, and noting: "We are confident, however, that the defendant's common sense will prevail and that plaintiff's apprehensions about defendant's trying to collect such royalties in the face of the collateral estoppel effects of this opinion may be put to rest.").

[8] Second, asking for "more" relief where monetary relief will satisfy the claimant's needs cannot defeat the jurisdictional scheme set up by Congress—to centralize money claims against the government, except those claims under $10,000 and those sounding in tort, in the Claims Court. Congress has carefully set up the division between the two courts and we must be cautious not to undermine that congressional decision. *Cf. Hoopa Valley,* 596 F.2d at 445 ("The division of jurisdiction between the two courts requires that the courts be careful to reject Tucker Act claims masquerading as suits for injunctive or declaratory relief.").

[9] Third, where an action primarily seeks monetary relief, it is improper to deny the Claims Court jurisdiction simply because it cannot grant the precise equitable relief requested. *See, e.g., Portsmouth,* 706 F.2d at 474; *American Science & Eng'g,* 571 F.2d at 62 (citing *International Eng'g Co., Div. of A-T-O, Inc. v. Richardson,* 167 U.S. App. D.C. 396, 403, 512 F.2d 573, 580 (1975), *cert. denied,* 423 U.S. 1048, 96 S.Ct. 774, 46 L.Ed.2d 636 (1976); *Warner,* 487 F.2d at 1305.

Finally, we think it is relevant to note that the remand that Amoco seeks for purposes of directing DOI to recalculate the royalties is, in fact, available in the Claims Court. "[T]he Claims Court can issue declaratory relief that is 'tied to and subordinate to a monetary award.' " *Portsmouth,* 706 F.2d at 474 (citing *S.J. Groves,* 495 F.Supp. at 209; *see also Gibson,* 619 F.Supp. at 1576-77. A 1972 amendment to 28 U.S.C. § 1491 gave the Claims Court limited equitable jurisdiction incidental to its jurisdiction over monetary claims: "In any case within its jurisdiction, the [Claims Court] shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." *But cf. Melvin v. Laird,* 365 F.Supp. 511, 517-20 (E.D. N.Y.1973) (discussing legislative history of the 1972 amendment and noting that "[t]he legislative background . . . leaves little doubt that the added powers of the Court of Claims to grant incidental relief were in no way intended to oust the jurisdiction of the district courts to act pursuant to its mandamus and declaratory judgment powers.").

IV.

[10] Because we find that this is essentially a claim against the United States for monetary relief in excess of

$10,000, the Claims Court has exclusive jurisdiction under 28 U.S.C. §§ 1346(a)(2) & 1491. Accordingly, the district court was without jurisdiction to hear this case. We VACATE the district court's judgment and REMAND to the district court with instructions to transfer the case to the Claims Court pursuant to 28 U.S.C. § 1631. *See Portsmouth*, 706 F.2d at 475; *cf. Kidde, Inc. v. E.F. Bavis & Assocs., Inc.*, 735 F.2d 1085, 1086 (8th Cir. 1984). Costs shall be borne by Amoco.

APPENDIX C

AMOCO PRODUCTION COMPANY

v.

Donald P. Hodel, et al.
Civ. A. No. 84-0916 "L".

United States District Court,
W.D. Louisiana,
Lafayette-Opelousas Division.

Feb. 5, 1986.

Liskow & Lewis by Gene W. Lafitte, George J. Domas, Deborah B. Price and Anne E. Tate, New Orleans, La., for plaintiff.

U.S. Dept. of Justice, Leslie K. Dellon, Federal Programs Branch, Civil Div., Dennis G. Linder, Stephen E. Hart, Washington, D.C., Joseph S. Cage, Jr. by Lawrence W. Moon, Jr., Lafayette, La., for defendants.

Milling, Benson, Woodward, Hillyer, Pierson & Miller by Charles D. Marshall, Jr. and David N. Schell, Jr., New Orleans, La., amicus curiae.

MEMORANDUM RULING

DUHE, District Judge.

I. FACTUAL BACKGROUND

This matter arises out of a dispute between Amoco Production Company and the federal government over the amount of additional royalties, interest and penalties Amoco owes, if any, for its lease of government-owned

natural gas tracts on the Outer Continental Shelf (OCS) offshore Louisiana. Amoco brought this action requesting a declaratory judgment and injunctive relief. Both parties now move for summary judgment.

Amoco is the co-lessee of federal lease OCS-G 2866, granted in 1974 under the Outer Continental Shelf Lands Act. Amoco, as lessee, is required to pay the government a "royalty of 16⅔ percent in amount or value of production saved, removed, or sold" from the leased area. For all times pertinent to this suit, Amoco's share of production from Lease OCS-G 2866 has been sold pursuant to two warranty contracts: one with Florida Gas Transmission Company and a second with Florida Power and Light Co. (FPL). The gas sold under the former contract is immaterial to this action.

The FPL contract was executed in 1965, almost a decade before Amoco acquired Lease OCS-G 2866 from the government. As a warranty contract, Amoco's agreement with FPL did not specify the source or origins of the quantity of gas that Amoco was obligated to deliver. At some point after it acquired Lease OCS-G 2866 from the government, Amoco began to use production from it to satisfy its obligations under the FPL contract.

On February 1, 1977, the U.S. Geological Service issued a value determination letter which established the royalty valuation from Amoco's production of gas from Lease OCS-G 2866. This value determination was made pursuant to 30 C.F.R. 650.-64, and Amoco concedes that since it did not appeal that ruling, it was bound by it until it was superseded.

In July 1982, following an audit, the Royalty Compliance Office of the Minerals Management Service (MMS) ordered Amoco to pay additional royalties owed from Lease OCS-G 2866 in the amount of $10,424,298.62, for the period of January 1977 through December 1979. In September 1982 the Royalty Compliance Office assessed $3,920,015.52 in interest against Amoco.

Amoco paid both the additional royalties and the late payment assessment of interest, and appealed those rulings of the Royalty Compliance Office to the Director of the MMS. In an order dated April 4, 1983, the Director upheld both rulings.

Amoco then appealed to the Department of Interior Board of Land Appeals ("IBLA"). This body, on December 19, 1983, affirmed the Director's decision.

Amoco has since brought this action seeking declaratory and injunctive relief, requesting among other things:

(1) a declaratory judgment that the decision of the IBLA is null and void,
(2) a permanent injunction against the government barring it from enforcing the IBLA decision,
(3) an order requiring the government to recalculate the royalties owed by Amoco on the basis of the price Amoco received from FPL for the gas.

II. THE LEGAL ISSUES

As noted earlier Amoco concedes that since it failed to appeal the MMS February 1977 valuation it is barred from challenging that ruling while it was effective. Amoco argues, though, that this ruling was later superseded by

another valuation ruling by the MMS, and later by the Natural Gas Policy Act of 1978 (NPGA).

A. The Notice to Lessee

Amoco argues that it does not owe the additional royalties and interest for the period of July 1, 1978, through December 31, 1979, on the grounds that the February 1, 1977, valuation was superseded by a second in June 1978. This later valuation, Amoco contends, was consistent with the royalties it paid under the FPL contract price.

On June 1, 1978, Amoco was issued Notice to Lessee 78-2 ("NTL 78-2") by the same office which had issued the February 1977 valuation. It is uncontested that Lease OCS-G 2866 is within the scope of the notice. However, after a challenge by Amoco and by others, NTL 78-2 was declared invalid on procedural grounds on January 15, 1979. Since NTL 78-2 was invalid, there is no need for this Court to examine the question of what the effect of NTL 78-2 might have been had it been valid. Since it was invalid it could not have superseded the February 1977 valuation determination.

B. The Natural Gas Policy Act of 1978

The NGPA was enacted into law on December 1, 1978. Amoco argues that § 3315 of the NGPA established price ceilings on its sale of gas from Lease OCS-G 2866 to FPL, and that as a consequence the government is precluded from recovering royalties based upon a value that exceeds the government-imposed price.

1. Do the Price Ceilings of § 3315 Apply?

15 U.S.C. § 3315, provides in pertinent part:

> (a) Application.—The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, *sold under any existing contract* or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978.
>
> (b) General rule.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—
>
> > (A) the price under the terms of the *existing contract, to which such natural gas was subject* on November 9, 1978, as such contract was in effect on such date; or . . .

The government argues that since Amoco's contract with FPL was a warranty contract, that is, Amoco was not obligated to provide its required quantity of gas to FPL from any particular source, that the gas in Lease OCS-G 2866 was not "subject to" an existing contract as contemplated by § 3315(b)(1)(A). Amoco responds by arguing that the gas was "sold under" the existing contract within the meaning of § 3315(a).

[1] On the date in question—November 9, 1978—the gas from Lease OCS-G 2866 *was sold* to FPL under an existing contract. That contract governed the terms and conditions of the sale of the gas. That such contract was a warrant contract, this court thinks, is immaterial. Furthermore, the OCS-G 2866 gas *was subject* to the FPL contract

on the date in question—again, November 9, 1978. Contra, *LL & E v. Texaco,* 478 So.2d 926 (4th Cir. 1985). That Amoco was not obligated to subject the OCS-G 2866 gas to the FPL contract on that date is immaterial since Amoco *did* subject that gas to the FPL contract by selling it under those terms. Amoco having so opted, the gas in Lease OCS-G was bought within the scope of § 3315, and remains so under any successor contract. Accordingly, this court holds that the price ceilings of § 3315 applied to the gas produced from Lease OCS-G 2866.

This conclusion is supported by the Fifth Circuit's admonition that statutory meaning is to be derived not from reading of a single sentence or section, but from the provisions of the whole law, its object and policy. *ZeMurray Foundation v. United States,* 687 F.2d 97, 102 (5th Cir. 1982). The government has not suggested any reason—nor do I think it could—why Congress would have intended to distinguish between warrant contracts and other contracts for purposes of the price ceilings of § 3315. Congress's intent seems clear—the price ceilings of § 3315 apply to gas sold under existing contracts—or successor contracts—not dedicated to interstate commerce. I believe I adhere to that intent in this holding.

2. The Effect of § 3315's Price Ceilings.

Amoco now argues that since after December 1, 1978 (the effective date of the NGPA) it could not exceed the price ceilings of § 3315 for the gas it sold to FPL, the government is precluded from exacting royalty based on a value greater than those price ceilings. The government responds by arguing that the NGPA is simply immaterial to the government's royalty valuations.

Under the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331, *et seq.*, the Secretary of the Interior is authorized to grant leases for the recovery of minerals from the subsoil and seabed of the OCS. *Id.* at § 1337. The Secretary is required to conduct leasing activities "to assure receipt of fair market value for the lands leased and the rights conveyed" by the government. *Id.* at § 1344(a)(4). Under the lease, Amoco agreed that the Secretary could establish minimum values for purposes of computing royalties, and that the Secretary could make such a determination only after due notice had been given to Amoco.

Amoco made such a request in January 1977, and the Department made a determination within a month on the basis of 30 C.F.R. 250.64 (1977; since amended and redesignated as 30 C.F.R. 206.150). The regulation then provided:

> The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices [applies only to oil], and to other relevant matters. Under no circumstances shall the value or production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value

> computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

Applying the factors from the foregoing regulation, the Department established the royalty value for the gas sold to FPL as "well spud dates pursuant to FPC opinion No. 770-A". This valuation was higher than the contract price received by Amoco from FPL—and thus higher than the price controls which went into effect on December 1, 1978. As noted Amoco did not contest this value. Of course, during the entire period in question, Amoco failed to make royalty payments consistent with this determination.

Since it did not contest this February 1977 valuation, Amoco concedes that it is liable for the underpaid royalties from February 1, 1977, until this valuation was superseded. Since this court has rejected Amoco's contention that NTC 78-2 had any effect, Amoco is liable for underpayments from February 1977 to at least December 1, 1978, the effective date of the NGPA. Of course, if the NGPA price controls do not supersede the February 1977 valuation Amoco is liable for underpayments from the entire period.

Citing *Flowers v. Diamond Shamrock Corp.*, 693 F.2d 1146 (5th Cir. 1982) and *Bowers v. Phillips Petroleum Co.*, 692 F. 2d 1015 (5th Cir. 1982), Amoco argues that a royalty valuation cannot exceed the maximum lawful price imposed by a government regulation. In both cases, which involved gas dedicated for sale in the contracts, the Fifth Cir-

cuit held that under Texas law market value for royalty purposes cannot exceed the maximum price at which the gas produced from the lessor's wells may be sold under its particular price categorization in the Act. *Flowers,* 693 F. 2d at 1154. These cases, then, are simply inapposite to the present question of whether a royalty valuation by the government made pursuant to 30 C.F.R. 250.64 (1977) can subsequently become invalidated by the imposition of government price controls which are lower than that valuation.

On the surface it may appear inequitable to hold that gas has a value for royalty purposes greater than the price for which it can be sold in the market place. However, it must be remembered that the gas could have been sold at a higher price had Amoco elected to do so on the effective date of the NGPA price controls. Instead it elected to fulfill its obligation to FPL under a contract negotiated many years before at a price which no longer reflected true market value. The royalty owner should not, because of this, suffer a reduction in the value of its royalty on gas which was probably not even discovered when the FPL contract was made. The valuation determination was made in 1977 well in advance of the NGPA price ceilings. The controls imposed were not some arbitrary price but rather kept in place the price Amoco happened to be charging for the gas on November 8, 1978.

Flowers and *Bowers* are distinguishable in two senses. First, they govern market value for royalty purposes under Texas law. In the present case, the validity of the royalty valuation made in 1977 is not impeached. The issue is the significance of the later imposition of price controls.

Second, in *Flowers* and *Bowers* neither producer chose the price ceiling which was beneath the royalty valuation. In the present case, Amoco, in effect, did choose the price ceilings imposed upon it.

Amoco, citing *Boutte v. Chevron*, 316 F.Supp. 524 (E.D. La. 1970),*aff'd*, 442 F.2d 1337 (5th Cir. 1971), also argues that the government's adherence to this royalty valuation after the imposition of price ceilings is "confiscatory and violative of the Fifth Amendment." This case, too, is inapposite. *Boutte* simply stands for the proposition that a court may not order a lessee to pay royalties to its lessors based on a valuation which has not been finally determined by the appropriate administrative authority. (Chevron given right to deny higher royalties when the valuation was subject to being overturned by Federal Power Commission).

Finally Amoco argues that the government is bound to an implied covenant of good faith in its performance under the lease, and that that duty has been breached when the government makes a valuation determination exceeding the regulated ceiling price. Essentially, Amoco contends that the subsequent imposition of price ceilings made the February 1977 valuation arbitrary and capricious.

5 U.S.C. § 706 empowers this court to hear appeals from the Department of Interior's Board of Land Appeals. It provides:

> To the extent necessary to decision and when presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful, and set aside agency action, findings, and conclusions found to be—

A. arbitrary and capicious, an abuse of discretion, or otherwise not in accordance with law;

B. contrary to constitutional right, power, privilege, or immunity;

C. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

D. without observance of procedure required by law;

E. unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

F. unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

In hearing an appeal under § 706, this Court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1970).

It is uncontested that the 1977 valuation determination was made pursuant to the pertinent statutory and

regulatory criteria. Thus, the Secretary's valuation was not an abuse of discretion. Amoco's misfortune is that it did not find a purchaser that would have paid what the Secretary in 1977 determined to be the "reasonable value" of the gas, given all the relevant factors. Amoco chose to undersell its gas, simply ignored the February 1977 valuation determination and continued to pay royalties based on a lower rate.

[2] Accordingly, this Court holds that even though the price ceilings of the NGPA apply to the gas in question, the initial royalty valuation was proper and was not invalidated by the later imposition of NGPA price ceilings.

III. THE ASSESSMENT OF INTEREST

Amoco finally argues that the government's assessment of interest was excessive and premature. The former argument is based on the claim that Amoco had no liability for royalties for the July 1978-December 1979 period. This Court's disposition of that claim similarly disposes of Amoco's contention that it owed no interest from that period.

Amoco's prematurity argument is that the government assessment of interest constituted a taking of property without due process, since the "legal right of the MMS to the additional royalties upon which the interest and penalties were assessed was not yet established by final order or judgment." (Amoco's memorandum in support of MSJ at 33).

[3] The government pursuant to 30 C.F.R. 250.49 (since redesignated as 30 C.F.R. 218.50), assessed interest upon Amoco in 1982 for its late payment of past-due royalties.

Due process was satisfied by the government. Had Amoco paid the then-due royalties in a timely manner, even under protest, it could have avoided the interest assessment. Accordingly, the interest assessment was not a taking violative of the Fifth Amendment's due process clause.

IV. CONCLUSION

To recapitulate, this Court finds:

(1) the February 1977 royalty valuation was proper both procedurally and substantively;

(2) the NTL 78-2 of June 1978 did not supersede the February 1977 valuation;

(3) the NGPA of 1978, which took effect December 1, 1978, did not invalidate the 1977 royalty valuation made by the government, even though it did apply to the lease in question; and

(4) the government's assessment of interest was proper and did not deprive Amoco of its property without due process.

Accordingly, summary judgment will be entered in favor of the government and against Amoco for the latter's liability for underpaid royalties and interest from February 1977 through December 1979.

APPENDIX D

UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

AMOCO PRODUCTION CO.

IBLA 83-681 Decided December 19, 1983

An appeal of a decision by the Director, Minerals Management Service, denying a protest against a determination that royalty for certain gas produced from oil and gas lease OCS-G 2866 was underpaid, and a later assessment of a late payment charge.

Affirmed.

1. Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases

   The United States, as lessor of an oil and gas lease, is entitled to its royalty based on "the reasonable value" of the gas as set by the Secretary. Where a party challenges a determination as to the value of gas produced, the party must establish that the methodology used in the Government's computation is, in fact, erroneous.

2. Laches—Outer Continental Shelf Lands Act: Oil and Gas Leases—Payments: Generally

30 CFR 250.49 authorizes Minerals Management Service to impose a late payment interest charge where royalty payments for offshore oil and gas leases are untimely or improper. The authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

APPEARANCES: William M. Meyers, Esq., George J. Domas, Esq., Deborah Bahn Price, Esq., New Orleans, Louisiana, for Amoco Production Company; Charles R. Shockey, Esq., Department of the Interior, Office of the Solicitor, Washington, D. C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Amoco Production Company (Amoco) appeals the April 4, 1983, decision of the Director, Minerals Management Service (MMS), denying its protest against a July 20, 1982, determination that it underpaid its royalty obligation by $10,424,298.62 for gas produced from oil and gas lease OCS-G 2866 between February 1977 through December 1979 and sold to Florida Power and Light (FP&L), and a September 17, 1982, determination that Amoco was liable for late payment assessments in the amount of $3,920,015.52.

Lease OCS-G 2866 was issued effective December 1, 1974, under the authority of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§1301-1343 (1970), for all of Block 23, Vermilion area, Offshore Louisiana (map No. 3), constituting approximately 5,000 acres. The lease required the lessee to "pay the lessor a royalty of 16-2/3 percent in amount or value of production saved, removed, or sold from the leased area." Since commencement of production under the lease, Amoco has sold its share of the natural gas produced to Florida Gas Transmission (FGT) and FP&L under a contract executed in 1965.[1] On February 1, 1977, Geological Survey (Survey), predecessor to MMS in functions concerning offshore mineral lease management, advised Amoco that royalty value for gas sold to FP&L was to be based on "well spud dates pursuant to Federal Power Commission [(FPC)] Opinion No. 770-A."[2] Effective December 1, 1978, Opinion No. 770-A prices were incorporated in section 104 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3314 (Supp. V 1982).[3]

After a review of Amoco's royalty computations submitted for the period February 1974 through December 1979, MMS issued a determination dated July 20, 1982, stating as follows:

---

[1] Amoco is a 33.33333 percent shareholder in OCS-G 2866. The contract with FP&L was cancelled by its terms in Jan. 1967, but was reinstated, as modified, on Aug. 4, 1967.

[2] The value for gas sold to FP&L was to be calculated pursuant to FPC Opinion No. 770-A as follows: (15.025/14.73) [Base Price (BTU determination/1000) + gathering allowance + transportation allowance].

[3] The maximum lawful price under this section for any month was to be the higher of:

Our review shows that for the period of February 1977 through February 1979, Amoco valued its share of natural gas from the referenced lease at the Florida Gas Transmission (FGT) contract price of $.2125 per MCF. However, Amoco was shipping a portion of its share of the natural gas to Florida Power and Light Company (FP&L). For the period of March 1979 through December 1979, Amoco included only a portion of the natural gas shipped to FP&L at NGPA, Section 104, Post 1974 prices in their computation of MMS royalties. Amoco's computation of MMS royalties for shipments made to FP&L are not in accordance with the MMS value determination letter to Amoco, dated February 1, 1977 (see attached). This letter established the fair market value to be a rate that would be received based upon well spud dates pursuant to FPC Opinion No. 770-A. (Title 30 CFR 250.64).

During September through December 1979, Amoco computed MMS royalties based upon calculated volumes, which deleted gas volumes bypassed around the gas processing

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(footnote 3 continued)

"(A)(i) the just and reasonable rate, per million Btu's, established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before November 9, 1978, and which is applicable to such natural gas."

> plant. Additionally, when Amoco computed MMS royalties based upon residue and natural gas liquid products, residue gas used as dehydration station fuel was not included in the royalty computation. Gas used as fuel for gas treatment functions should be included in the computation of royalties due MMS.

MMS concluded that the royalty payments for the period in question were deficient by $10,424,298.62,[4] and informed Amoco that late payment charges would be assessed pursuant to 30 CFR 250.49.

Amoco appealed to the Director, MMS, arguing that production value should be based on the proceeds received under the contract for sale to FP&L and that MMS failed to adequately consider the regulatory effect of NGPA in making its decision. Meanwhile, MMS issued a late payment assessment of $3,920,015.52, which Amoco protested as premature and inequitable.[5]

The Director, MMS, affirmed the July 20, 1982, determination in an April 4, 1983, decision because the FP&L contract "merely was a warranty contract," and thus Amoco was "free to sell the gas in question to a third party at the FPC Opinion No. 770-A vintage III prices and later at the NGPA Section 104 post-1974 prices." Moreover, the

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[4] With regard to the gas shipped to FP&L during the period Feb. 1977 through Nov. 1978, the additional royalties demanded were based on the rate approved by FPC Opinion No. 770-A with respect to Vintage III gas.

As to gas shipments to FP&L during the period Dec. 1978 through Dec. 1979, royalties were recomputed with reference to well spud dates on the basis of the NGPA section 104 post-1974 prices.

[5] The amount assessed was determined after Amoco's payment of deficient royalty was received on Aug. 20, 1982.

Director declared that Amoco was precluded from challenging the production values established by the February 1, 1977, value determination letter because it had failed to timely appeal that action.

Amoco has, in turn, appealed to this Board pursuant to 30 CFR 290.7, asserting that the Director's decision was erroneous in the following conclusions: (1) All relevant factors listed in 30 CFR 250.64 regarding royalty valuation were considered and adequately explained; (2) the FP&L contract price was not the maximum price under NGPA; and (3) Amoco could sell gas from OCS-G 2866 to third parties and still satisfy its contractual warranty obligations to FP&L with gas from other sources. In regard to the late payment charges, Amoco argues that assessment of such charges is premature, as no final adjudication has been made that Amoco is liable, and that it is inequitable for MMS to assess a charge for the late payment.

[1] The Secretary of the Interior is authorized to lease tracts of the Outer Continental Shelf under OCSLA for the exploration and development of mineral resources, including oil and gas. In passing the Act, Congress committed the Government to the goal of obtaining fair market value for Outer Continental Shelf (offshore) oil and gas resources. *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 162 (1981).[6] Computing the royalties payable for offshore gas production involves: (1) A determination of the amount of production on which royalties are to be paid;

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[6] 43 U.S.C. § 1344 (a)(4) (Supp. V 1981) states: "Leasing activities shall be conducted to assure receipt of fair market value for lands leased and the rights conveyed by the Federal Government." *See also* 43 U.S.C. § 1344 (a)(1) (Supp. V 1981).

(2) a determination of the value of the gas produced; (3) a determination of the deductions to be allowed; and (4) application of the rate of royalty provided for in the lease.

The Secretary of the Interior possesses considerable discretion for determining what is the "value" of production.[7] Indeed, the lease signed by Amoco states that the lessee "expressly agreed that the Secretary may establish minimum values for purposes of computing royalty on production obtained." The exercise of the Secretary's statutory discretion is found in the promulgation of 30 CFR 250.64, which establishes the factors to be considered when determining value for royalty computations.

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[7] In 1977, section 8 (b) of OCSLA, 43 U.S.C. § 1377(b) (1976), read: "An oil and gas lease issued by the Secretary pursuant to this section shall * * * require the payment of royalty not less than 12-1/2 per centum in the amount or value of the production saved, removed, or sold from the lease * * *."

Nowhere does the Act provide a process or scheme for determining "value," should royalty be exacted in other than "kind." However, section 5(a)(1) of OCSLA, 43 U.S.C. § 1334(a)(1) (1976) stated in part: "The Secretary shall administer the provisions of this subchapter relating to the leasing of the Outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions." *See also* 43 U.S.C. § 1334 (a) (Supp. V 1981) (1978 amendment to OCSLA).

By comparison, section 32 of the Mineral Leasing Act of 1920, 30 U.S.C. § 189 (1976), provides: "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter [relating to onshore mineral leasing]." In view of that language, we held that "the Secretary of the Interior has considerable latitude in determining what is the 'value' of production from a lease on which royalty payments are made." *Hoover & Bracken Energies, Inc.*, 52 IBLA 27, 88 I.D. 7 (1981), *rev'd on other grounds, Hoover & Bracken Energies, Inc. v. Dept. of Interior*, No. CIV-81-461T (D.C. Okla. Nov. 18, 1981), *appeal docketed*, No. 82-1074 (10th Cir. Jan. 15, 1982). Because of the similarity in authority to manage the respective leasing programs, it would follow that the Secretary enjoys the same discretion to determine value of production with respect to offshore mineral leasing.

The version of 30 CFR 250.64 in effect in 1977 when the value for gas sold to FP&L was determined, read as follows:

> The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

(30 CFR 250.64 (1977)). It was amended in 1979 to provide:

> The value of production shall never be less than the fair market value. The value used in the computation of royalty shall be determined by the Director. In establishing the value, the Director shall consider: (a) The highest price paid for a

> part or for a majority of like-quality products produced from the field or area; (b) the price received by the lessee; (c) posted prices; (d) regulated prices; and (e) other relevant matters. Under no circumstances shall the value of production be less than the gross proceeds accruing to the lessee from the disposition of the produced substances or less than the value computed on the reasonable unit value established by the Secretary.

(30 CFR 250.64 (1982)) *See* 44 FR 61886, 61903 (Oct. 26, 1979). This amendment became effective December 1, 1979, only 19 days before the period in question ended. Under both versions of 30 CFR 250.64, the value for the produced gas is established after consideration of the listed factors, and both provide that the values shall never be less than the proceeds received by the lessee from the sale or disposal of the produced substances or less than the reasonable unit value established.

As noted, the value determination was presented to Amoco, unopposed, in February 1977.[8] Any decision by MMS, or Survey, issued under the regulations concerning Outer Continental Shelf leasing must be appealed to the Director of that agency (MMS or Survey) within 30 days from service of the decision. 30 CFR 250.81; 30 CFR 290.3. The timeliness of Amoco's subsequent attack upon that determination was addressed in the decision appealed.

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[8] The lease provides that "[e]ach [value] determination [by the Secretary] shall be made only after due notice to the lessee and a reasonable opportunity has been afforded the lessee to be heard." Amoco presented a request for a royalty payment procedure in its Jan. 14, 1977, letter, but did not respond to the subsequent determination.

Amoco concedes that it did not appeal the February 1, 1977, determination and waives contesting any royalty disagreement for the period prior to June 1, 1978. It asserts a right to appeal the royalty payments subsequent to "Notice to Lessees 78-2" (NTL) issued by Survey on June 1, 1978, and NGPA, arguing that both superseded the February 1977 determination and restricted the value for royalty computations on gas produced from OCS-G 2866 and received by FP&L to the proceeds obtained under the FP&L contract.

Amoco refers to section II of the NTL which provides that the royalty value for sales not subject to the price jurisdiction of the Federal Energy Regulatory Commission (FERC) and *subject to an arm's-length contract* "shall be established as the higher of: a. The price received by the lessee or operator in accordance with the provisions of the applicable sales contract, or, b. A minimum value of not less than 18.36 cents per mcf."[9]

Pursuant to NGPA, effective December 1, 1978, the sale of all natural gas produced in the United States became subject to ceiling price limitations. Amoco argues that under the Act the contract price with FP&L is the maximum lawful price because the gas produced qualifies for sale only under section 105 of NGPA, 15 U.S.C. § 3315 (Supp. V 1981). This section provides that the maximum lawful price for sales of natural gas *under any existing contract to which the gas is subject* which was not committed to interstate commerce in November 1978 shall be the lower of either the price under the terms of the contract or else the price established for "new" uncommitted gas.

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[9] MMS, in opposition, argues that the "NTL does not even purport to supersede the effectiveness of the underlying regulations upon which the specific royalty valuation at issue here was based."

Amoco devotes a major portion of its statement of reasons alleging error in the value determination because Survey did not apply all the factors in 30 CFR 250.64. It asserts that Survey failed to explain why the royalty valuation was based upon the highest prices available in the market and argues that "like-quality" in this situation means gas to be produced which is committed for sale under a long-term obligation at a price reflecting the 1965 market. Indeed, we have held that there must be a reasonable basis for the determination to set value other than at the actual price received. *Supron Energy Corp.*, 46 IBLA 181 (1980), *appeal pending, Supron Energy Corp. v. Watt*, Civ. No. 80-0463 (D.N.M. *filed* June 18, 1980). However, proceeds and fair market value may not be interchangeable when determining value of production. *Wheless Drilling Co.*, 13 IBLA 21, 80 I.D. 599 (1973).

Amoco argues that the Director's decision is inconsistent with precedent. It specifically refers to a Federal Register notice, 47 FR 16423, 16425 (Apr. 16, 1982), which it claims proposed royalty valuation methods for Gulf of Mexico gas. However, the "preliminary finding" appearing in the notice of hearing is not relevant to the present circumstances inasmuch as it was not presented until well after the period in question and, moreover, the scheme presented does not appear inconsistent with that used by Survey in its value determination.

Amoco also cites two Fifth Circuit decisions, *Bowers v. Phillips Petroleum*, 692 F. 2d 1015 (5th Cir. 1982), and *Flowers v. Diamond Shamrock Corp.*, 693 F.2d 1146 (5th Cir. 1982). In holding that the value for royalty computation could not exceed the Federally regulated maximum price, each of those decisions involved gas produced under private lease agreements and subject to a sales contract.

After all of Amoco's arguments are considered, the narrow issue on appeal regarding the value determination is whether the gas produced from OCS-G 2866 and delivered to FP&L was subject to sale under the contract with FP&L. The valuation scheme which Amoco advocates is applicable to the gas delivered to FP&L depends upon the gas being "subject to" an existing contract.

The term "subject to," used in its ordinary sense, means "subordinate to" or "controlled by." *See Black's Law Dictionary* 1278 (5th ed. 1979). Under a "conventional sales" contract for the sale and delivery of natural gas, a producer promises to sell all the gas produced from either specific wells or specific fields. In other words, the production from a specific source is "dedicated" to the fulfillment of the contract. In a "warranty" contract, the producer agrees to sell a specific amount of gas and the gas delivered in satisfaction of this obligation may come from any source without regard to designated wells or fields. *Shell Oil Co. v. Federal Power Commission*, 531 F. 2d 1324, 1327 n. 6 (5th Cir. 1976).

The contract with FP&L does not specify a particular source, viz.: "Sellers own or control oil, gas and mineral leaseholds and/or lands in Southern Louisiana and offshore thereof, and Sellers will have a supply of gas available from their respective properties." In fulfilling the obligation to deliver, "[Sellers] may offer [gas] belonging to others." FP&L agrees "to purchase and receive, or pay for if available and not taken, from Sellers, collectively, the applicable Contract Demand Quantity per day, averaged over each month," which quantity was originally set as 100,000 MMBTU [10] until December 31, 1967, and 200,000 MMBTU

[10] MMBTU represents the quantity of natural gas which contains the equivalent of 1,000,000 British thermal units (total heating value).

thereafter until the first occurrence of either the delivery of 1,424,500,000 MMBTU or the twentieth anniversary of the first delivery under the contract. Amoco continually argues that it was obligated by the contract to sell only gas produced from OCS-G 2866 or other sources in the area. The contract provisions do not support such conclusion. Furthermore, Amoco's statement that the contract is no longer a "warranty contract" is irrelevant to the period in question. The agreement was not converted to a "conventional sales contract" until June 9, 1982.[11] Prior to that time Amoco had simply chosen to satisfy its contractual obligations to FP&L by delivering gas from OCS-G 2866. That business election cannot bind the United States to accept a lower royalty than it otherwise would be entitled had Amoco chosen some other source of supply for FP&L.

With regard to Amoco's assertion that it was locked into the price it received from FP&L, we note the Fifth Circuit decision in *Shell Oil Co. v. Federal Power Commission, supra.* The decision there was based on the determination that a contract to deliver a specified amount of gas at a specified price, or a warranty contract, did not preclude the seller from seeking approval from FPC of higher prices for gas from sources previously used to supply the buyer under the warranty. Likewise, Amoco was not prevented from selling at a higher price the gas produced from OCS-G 2866.

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[11] The Aug. 4, 1967, agreement which reinstated the FP&L contract provided that after the expiration of 15 years following the date of initial deliveries of gas, the sellers were obligated thereafter to deliver all gas produced from wells which were being used at that time to supply the gas delivered to FP&L under the contract. We do not address the efficacy or effect of that provision.

MMS' declaration of underpaid royalties does not create unjust enrichment. Under the circumstances, Amoco's obligation to pay royalties at prevailing "highest price" or "fair market value" is not lessened because it has made long term warranty commitments. The regulations clearly allow the superimposition of a value determination based on actual market conditions on any sales price which falls below the standard of reasonableness. The United States is entitled to its royalty based on "the reasonable value" of the gas as set by the Secretary, which may not be less than the highest price received for similar gas.

Where a party challenges a determination as to the value of gas or other hydrocarbons produced from a lease with the United States, the party must establish that the methodology used is, in fact, erroneous. *Supron Energy Corp.*, 55 IBLA 318, 322 (1981), *appeal pending, Atlantic Richfield v. Watt*, Civ. No. 81-0615 (D.N.M. *filed* July 29, 1981). Survey's February 1, 1977, value determination letter established the category of gas sold to FP&L and the July 20, 1982, determination provided Amoco with the corrected computations of the royalties owed. Amoco has failed to demonstrate error in the Director's decision upholding the value determination and royalty recomputation.

[2] In regard to the late payment assessment, Amoco claims that such charge is premature because the matter was pending and its liability was unsettled. 30 CFR 250.49 authorizes MMS to impose a late payment interest charge where payments are untimely or improper, including underpayments. *See Atlantic Richfield Co.*, 21 IBLA 98, 82 I.D. 316 (1975). The charges under 30 CFR 250.49 are assessed from the date on which the payment was due until the date on which it was received.

Amoco claims that Survey was informed of its payment method in July 1979 and delayed in correcting the situation. It argues that the subsequent requirement to pay interest violates the "most fundamental notions of equity" in the face of such delay.

A discussion of equity necessarily includes a review of the underlying circumstances. Amoco was informed of the royalty payment procedures and the attendant value computation scheme for the sale of gas from OCS-G 2866 to FP&L. It could have promptly paid the monies due, accompanied by a protest, but apparently chose not to do so. Thus, it appears that it decided to use the funds rather than pay them to the United States, based on a hope that its interpretation of 30 CFR 250.64 would prevail. It is equitable that the United States should be compensated for the loss of the use of the funds due it under an express royalty computation and payment program.

As to Amoco's assertion that the Government is precluded from collection of the interest charge because of a failure to act, it is well established that the authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. *Alyson A. Allison*, 72 IBLA 333 (1983); *Warren L. Jacobs*, 71 IBLA 385 (1983). This recognizes the realities of administering the collection of royalties. When the lessee's reports and payments are received, MMS cannot immediately know the correctness of such material. It must necessarily take time to assemble the necessary data and then interpret it. Delays are reasonable in view of the burden upon it to perform this audit function for the many leases it must manage. Postpayment audits are a common incident to

mineral lease management. *See e.g., Mobil Oil Corp.*, 65 IBLA 295 (1982). Contrary to Amoco's claim, the delay in its payment of the correct amount due is attributable to its own activities and not those of MMS.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/S/ Signed
Edward W. Stuebing
Administrative Judge

We concur:

/S/ Signed
C. Randall Grant, Jr.
Administrative Judge

/S/ Signed
Douglas E. Henriques
Administrative Judge

Supreme Court, U.S.
FILED
OCT 30 1987
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CLERK

No. 87-372

In the Supreme Court of the United States

OCTOBER TERM, 1987

AMOCO PRODUCTION COMPANY, PETITIONER

v.

DONALD P. HODEL, SECRETARY,
DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in a dispute over the proper valuation of natural gas extracted from submerged lands pursuant to a lease issued under authority of the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. III) 1331 *et seq.*, the Claims Court has exclusive jurisdiction under the Tucker Act to adjudicate a suit to recover moneys that have been paid under protest to the Secretary of the Interior, and deposited into the United States Treasury.

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In the Supreme Court of the United States

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AMOCO PRODUCTION COMPANY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A35) is reported at 815 F.2d 352. The opinion of the district court (Pet. App. A36-A48) is reported at 627 F. Supp. 1375. The opinion of the Interior Board of Land Appeals (Pet. App. A49-A64) is reported at 78 I.B.L.A. 93.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 29, 1987. On July 17, 1987, Justice White extended the time within which

to file a petition for a writ of certiorari to and including August 27, 1987, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action concerns the amount of royalties that petitioner was required to pay to the Department of the Interior (DOI) between February 1977 and December 1979. Petitioner has paid the disputed amount under protest. The district court, after rejecting a challenge to its jurisdiction, entered summary judgment "in favor of the government and against [petitioner] for the latter's liability for underpaid royalties and interest from February 1977 through December 1979" (Pet. App. A48). The court of appeals vacated the district court's judgment on the ground that the court lacked jurisdiction (*id.* at A2-A35). Petitioner challenges the jurisdictional determination of the court of appeals.

1. a. The Secretary of the Interior (Secretary) issues oil and gas leases under the Outer Continental Shelf Lands Act (OCSLA or Act), 43 U.S.C. (& Supp. III) 1331 *et seq.* The Secretary's regulations, as pertinent here, provided that "[t]he value of production, for the purpose of computing royalty, shall be the *estimated reasonable value of the product*," determined by considering, among other things, "the highest price paid for a part or for a majority of production of like quality in the same field or area" (30 C.F.R. 250.64 (1977) (emphasis added) (current version codified at 30 C.F.R. 206.150)). See also 43 U.S.C. 1337.

On November 15, 1974, petitioner, as joint tenant with Gulf Oil Corporation (Gulf) and Mobil Oil

Corporation (Mobil), leased Block 23 of the Vermilion Area off the coast of Louisiana (A.R. 231-235 [1]). Under the lease, petitioner agreed to pay the United States a "royalty of 16⅔ percent in amount or value of production saved, removed, or sold from the leased area" (A.R. 231-232). Petitioner further agreed that performance under this lease covenant would be subject to regulations issued by the Secretary pursuant to the Act (A.R. 231).

Block 23 proved to contain commercially recoverable quantities of natural gas. On January 14, 1977, petitioner formally requested the United States Geological Survey (USGS) to determine a royalty value that would govern petitioner's royalty payments for its share of production from the lease (A.R. 7, 336). In response, on February 1, 1977, the USGS issued a valuation determination letter. The letter established the royalty valuation for petitioner's share of the gas at roughly $1.50/Mcf (thousand cubic feet) (A.R. 336-338).[2] Although petitioner was entitled to take an administrative appeal from that valuation determination within 30 days (30 C.F.R. 250.81, 290.3 (1977); A.R. 7), petitioner did not do so.

Nevertheless, petitioner did not pay the royalties that were due under the valuation determination letter. Instead, petitioner paid royalties computed by valuing its gas at $0.2125/Mcf (A.R. 339-351)—only a small fraction of the royalties due under the agency's valuation determination. Petitioner based

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[1] "A.R." refers to the record of administrative proceedings filed with the district court.

[2] The base price, $1.43/Mcf, was subject to escalation adjustments and was adjusted according to energy content; in addition, the complex formula contained gathering and transportation allowances (A.R. 337).

its computation of royalties on the price it received for the gas. Petitioner chose to use its share of the natural gas produced from Block 23 to meet its obligations under a contract with Florida Power & Light Co. (FP&L). That contract was executed on March 12, 1965 (A.R. 90, 130), and reflected 1965's comparatively low price levels. Petitioner's co-lessees, Mobil and Gulf, sold their shares of the identical natural gas, and computed their royalties, at prices of between $1.562 and $1.707/Mcf during the relevant period (A.R. 219-225).

The Minerals Management Service (MMS) audited petitioner's royalty payments under the lease for the period from January 1977 through December 1979 (A.R. 333) and determined that petitioner had underpaid the United States $10,424,298.62 for that period (A.R. 333-334).[3] Petitioner paid that amount (plus late charges) (Pet. App. A5) and pursued administrative appeals. As required by statute (43 U.S.C. 1338), the monies were "deposited in the Treasury of the United States and credited to miscellaneous receipts."

b. In the administrative proceedings, petitioner presented a series of equitable and legal arguments with respect to both the underpayments and the late charges. All of those arguments were ultimately abandoned except one: petitioner contended that the agency's 1977 valuation determination could not be

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[3] Most of the shortfall was attributed to petitioner's failure to compute royalties based on the February 1, 1977, valuation determination. But it was also determined that petitioner had improperly "deleted gas volumes bypassed around the gas processing plant" and failed to include "residue gas used as dehydration station fuel" (A.R. 333).

used after December 1, 1978, when the provisions of the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.* (NGPA), became effective. Specifically, petitioner argued that under Section 105 of the NGPA, 15 U.S.C. 3315,[4] the below-market prices petitioner had received for its share of the gas at Block 23 had become a ceiling price under the NGPA, and that this ceiling price imposed a cap on the value of the gas for royalty computation purposes.

On December 19, 1983, in a final administrative decision, the Interior Board of Land Appeals (IBLA)[5] upheld MMS's assessment of royalties for the period ending December 1979 (Pet. App. A49-A64). The IBLA rejected petitioner's interpretation of Section 105 of the NGPA (Pet. App. A49-A64). It held that Section 105 did not control (Pet. App. A58) because the 1965 contract between petitioner and the buyer, FP&L, was a "warranty" contract

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[4] Section 105, in pertinent part, states (emphasis added):

> (a) **Application**
>
> The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, *sold under any existing contract* * * *.
>
> (b) **Maximum lawful price**
>
> (1) **General rule**
>
> * * * [T]he maximum lawful price under this section [for any month] shall be the lower of—
>
> (A) the price under the terms of the existing contract, *to which such natural gas was subject* on November 9, 1978, as such contract was in effect on that date * * *.

[5] The IBLA is a subdivision of the Office of Hearings and Appeals within DOI.

that required petitioner to deliver certain quantities of gas at the specified price, but did not require that any particular gas, including the gas produced under the Block 23 lease, be used to satisfy those requirements. (Indeed, the FP&L contract was entered into almost ten years before petitioner signed the Block 23 lease.) The IBLA also stressed that petitioner's business decision to meet its warranty contract commitments with gas from the lease could not be used to deprive the United States of proper royalties (*id.* at A61-A62 (emphasis added)):

> [Petitioner] had simply chosen to satisfy its contractual obligations to FP&L by delivering gas from OCS-G 2866. *That business election cannot bind the United States to accept a lower royalty than it otherwise would be entitled had* [*petitioner*] *chosen some other source of supply for FP&L.*

2. On April 6, 1984, petitioner commenced this litigation by filing a complaint against the Secretary and the Director of MMS in the United States District Court for the Western District of Louisiana. Petitioner sought to invoke the district court's jurisdiction under 43 U.S.C. 1349(b)(1), 28 U.S.C. 1331, and 28 U.S.C. 1337 (see Pet. 7). Petitioner prayed for a declaration that the IBLA decision was arbitrary and capricious and inconsistent with "law," the Secretary's regulations, and the Fifth Amendment to the Constitution (Complaint at 9). Petitioner also asked for a remand of the administrative decision to DOI "to properly calculate the underpaid royalties" (*ibid.*). The government moved to dismiss on the ground that the suit was a claim for money damages against the United States; that none of the

statutes cited in the complaint authorized the entry of such a judgment by the district court; and that exclusive jurisdiction to entertain the suit was vested in the United States Claims Court under the Tucker Act, 28 U.S.C. 1491. The district court denied the motion without opinion. Subsequently, on the parties' cross-motions for summary judgment, the district court ruled in favor of the government on the merits.

3. Notwithstanding the favorable judgment, on petitioner's appeal the government once again challenged the jurisdiction of the district court. The government again argued that this was a suit against the government for money damages, cognizable only in the Claims Court. Petitioner, in response, "conceded * * * both that it does seek the eventual return of its money and that money would 'flow from,' or be the 'natural consequence' of, a determination that the DOI improperly valued the gas for royalty purposes" (Pet. App. A22; see also *id.* at A28 & n.15). But, petitioner said, its suit "[was] not *merely* a suit for money damages and thus [was] not cognizable under the Tucker Act" (C.A. Reply Br. 5 (emphasis added; footnote omitted)). Although petitioner had sought both retrospective relief and arguably prospective relief in its complaint,[6] petitioner

[6] Petitioner's complaint explicitly sought retrospective relief. It asked the court to "[a]djudge and declare that the decision in *Amoco Production Company*, 78 IBLA 93, issued on December 19, 1983, is void and ineffective because, for the period June 1, 1978, through December, 1979, the decision is arbitrary, capricious, and erroneous, and constitutes an abuse of the Secretary's discretion" (Complaint at 9). Likewise, the complaint asked the court to "[r]emand the decision to the Department of Interior to properly calculate the underpaid royalties due during the period February, 1977,

did not suggest that its action be split into two actions, a claim for money damages cognizable in the Claims Court and a claim for prospective relief cognizable in the district court.

A unanimous panel of the Fifth Circuit agreed with the government's position. The court of appeals held that petitioner's suit was an action against the United States (Pet. App. A15); that it was founded on the Constitution, a federal statute or regulation, or government contract (*id.* at A15-A18); and that, in "essence," petitioner's claim was one for money damages in excess of $10,000 (*id.* at A18-A34). The court of appeals held that the Claims Court enjoyed exclusive subject-matter jurisdiction over the action under the Tucker Act. The court of appeals made it clear, however, that it would have reached a different result if petitioner had not, before instituting suit, paid the disputed sums to the government (Pet. App. A19 n.10). The judgment of the district court was vacated (*id.* at A35), and the case was remanded to the district court with instructions to transfer the case to the Claims Court pursuant to 28 U.S.C. 1631.

Petitioner did not seek rehearing, nor did petitioner seek a stay of the Fifth Circuit's mandate that the case be transferred. The case was duly remanded to the district court, which, pursuant to the Fifth Circuit's mandate, transferred the case to the Claims Court. On June 11, 1987, all records of the district court were received by the Claims Court, where the proceeding is now docketed (Cl. Ct. No. 344-87).

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through May, 1978, and the interest penalties due on the late payments" (*ibid.*). Arguably, petitioner's complaint also sought prospective relief, in that it asked that the court "[p]ermanently enjoin and restrain the defendants * * * from enforcing or applying the decision" (*ibid.*).

ARGUMENT

There are two considerations, apart from the merits of the decision below, that make review of this case in this Court inappropriate: the district court has already relinquished jurisdiction over this case, and the IBLA has made clear that in most cases it will not require lessees to pay disputed amounts and sue for their recovery in order to adjudicate controversies over royalty payments. As to the jurisdictional questions presented in the petition (Pet. i), the court of appeals correctly decided an issue of first impression, and there is no conflict between the decision below and any decision of this Court or another court of appeals. The decision below does conflict with a recent decision of another court of appeals (from which we are seeking a writ of certiorari) with respect to the question whether an action seeking both retrospective and prospective relief against the United States can be divided into two actions, one heard by the district court and the other by the Claims Court. But petitioner never sought such bifurcation in the courts below, and this issue does not appear to be encompassed by the questions presented in the petition.

1. a. Petitioner would have this Court review the jurisdictional holding of the court below and, if successful, would have this Court vacate the decision of the court of appeals and remand the case for further proceedings on the merits. There is, however, no longer any case pending within the Fifth Judicial Circuit for that court of appeals to adjudicate.

The United States District Court for the Western District of Louisiana lost all jurisdiction when the files were physically transferred to the Claims Court.

The transfer of the files not only deprived the district court of jurisdiction, but the regional court of appeals as well. *Starnes* v. *McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); *In re Sosa*, 712 F.2d 1479, 1480 (D.C. Cir. 1983) (per curiam); *In re Southwestern Mobile Homes, Inc.*, 317 F.2d 65, 66 (5th Cir. 1963); see also 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3846, at 357 (1986). If petitioner wished to preserve the jurisdictional issues for this Court to review, it should have sought a stay of the decision below in order to prevent the transfer of the records until disposition of a petition for a writ of certiorari. Petitioner sought no such relief in the interim between April 29, 1987 (when the court of appeals rendered its decision), and August 27, 1987 (when it filed its petition).[7] Petitioner thus did not take the appropriate steps to preserve the jurisdictional issues for this Court's review.[8]

b. A recent change in policy by the IBLA greatly diminishes the practical significance of the Fifth Circuit's decision. The Fifth Circuit's holding is limited

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[7] Petitioner did not even seek rehearing in the court of appeals.

[8] The transferee forum here has jurisdiction, whether or not the transferor forum had jurisdiction (as petitioner claimed it did). The Claims Court will review the merits of petitioner's claims and, if it agrees with petitioner, will grant petitioner a money judgment and may also remand the case to the agency with appropriate instructions (28 U.S.C. 1491(a)(2)). That court's predecessor has, indeed, reviewed similar cases in the past. See *Foote Mineral Co.* v. *United States*, 654 F.2d 81 (Ct. Cl. 1981). Accordingly, the transfer of this case to the Claims Court will not deprive petitioner of its day in court, only of its preferred forum.

to payment-under-protest cases: "If [petitioner] had not paid, the government would have had to pursue [petitioner] for the royalties and late fees. That clearly would not be [a] Tucker Act claim." Pet. App. A19 n.10. The IBLA has recently held, however, that under its current regulations DOI must allow a suspension or stay of an order to pay pending an administrative appeal, on condition of posting adequate bond for the amounts in dispute, unless it finds that such suspension would be detrimental to the lessor. *Marathon Oil Co.*, 90 I.B.L.A. 236 (1986). In most cases, plaintiffs such as petitioner who wish to adjudicate their cases in district court rather than the Claims Court now will be able to do so by requesting such a stay and posting a bond. Because they will be seeking to prevent the government from taking money from them, rather than seeking the return of money paid to the government, their actions will not (according to the decision below) be governed by the Tucker Act.[9]

Accordingly, the number of future litigants who will be in a situation similar to petitioner's can be expected to be quite small, and the decision below will have little lasting impact in actions to review IBLA decisions.[10]

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[9] In this proceeding, the administrative record does not reflect any request by petitioner for relief from the payment requirement. Petitioner is, however, currently pursuing another suit challenging royalty computations. *Amoco Prod. Co.* v. *Hodel*, Civ. No. 87-0243 (W.D. La.). In that case, petitioner has obtained a bond and does not seek a money judgment against the United States.

[10] Petitioner notes that there are some litigants who have already paid disputed sums rather than posting bonds, and

2. On the merits, petitioner suggests that "[t]his Court should grant certiorari * * * because this decision would establish for the first time * * * the jurisdictional relationship between the United States Claims Court under the Tucker Act and the United States district court under the OCSLA" (Pet. 11). As petitioner recognizes, however, the decision below is the first to address the OCSLA issues that petitioner raises. Thus, there is plainly little need for this Court to address those issues at this juncture. Petitioner further contends that the decision below rests on "a rationale that conflicts with prior reasoning of * * * other circuit courts" in cases involving statutes other than the OCSLA (*ibid.*). But this alleged conflict in "rationales" is largely immaterial.[11] "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

The court below, in deciding an issue of first impression, correctly held that the monetary part of this action was maintainable only in the Claims Court

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speculates that some future litigants will be in such financial distress that they will be unable to post bonds (Pet. 20-21). But the fact that the decision below may affect a small class of future litigants, rather than none at all, hardly makes it a decision of such widespread impact and importance as to merit this Court's review.

[11] Petitioner also suggests a conflict between the "rationale" of the decision below and the "reasoning" of this Court (Pet. 11), but that suggestion turns out (see Pet. 13) to be based entirely on what this Court supposedly "implie[d]" in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 172-181 (1976). Such an attenuated claim of conflict does not warrant this Court's review.

under the Tucker Act.[12] Petitioner, however, contends (Pet. 11-16) (1) that there are situations in which an action that is cognizable in the Claims Court under the Tucker Act may nevertheless be heard in district court under a different statute that waives the sovereign immunity of the United States for claims for money damages, and (2) that the OCSLA is such a statute. We assume, arguendo, that petitioner's first proposition is correct. Even so, petitioner's second proposition is incorrect.

This action seeks money damages and, as petitioner recognizes (Pet. 15 & n.10 (citing *United States* v. *Testan*, 424 U.S. 392, 400 (1976)), the applicable waiver of sovereign immunity must therefore be one that applies to actions for money damages. The Tucker Act certainly is such a waiver.[13] But no sec-

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[12] As to the court's failure to divide the case into a nonmonetary (prospective) claim that could be pursued in the district court, and a monetary claim that could be pursued only in the Claims Court, see pp. 16-17, *infra*.

[13] The Tucker Act waives sovereign immunity to permit an action for money damages in all cases to which it applies. *United States* v. *Mitchell*, 463 U.S. 206, 212-216 (1983). In order for the Tucker Act to apply, "the claimant must demonstrate that the source of substantive law he relies upon ' "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." ' " *Id.* at 217 (quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976), quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). The court of appeals here correctly held (Pet. App. A18) that this requirement for Tucker Act jurisdiction is met in this case. In *United States* v. *Laughlin*, 249 U.S. 440, 442-443 (1919), this Court held that a statute worded virtually identically to Section 10(a) of the OCSLA, 43 U.S.C. 1339(a), was a source of substantive law that entitled a claimant to bring a Tucker Act action in the Court of Claims. See also *Foote Mineral Co.* v. *United States*, 654 F.2d 81, 84 (Ct. Cl. 1981).

tion of the OCSLA constitutes such a waiver, and no court has ever held that any such waiver exists in the OCSLA.[14]

Section 23 of the OCSLA, 43 U.S.C. 1349, does waive the sovereign immunity of the United States, and it provides for actions in district court. But nothing in Section 23 contemplates the availability of money damages against the United States. That section, added to the OCSLA in 1978 and based on a bill first introduced in 1974, is primarily intended to permit citizen suits to ensure compliance with the OCSLA. See Pub. L. No. 95-372, § 23(a), 92 Stat. 657; S. Rep. 93-1140, 93d Cong., 2d Sess. 31 (1974).[15] Thus, many actions against the United

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[14] Petitioner concedes that it can point to "no reported case [that] has discussed the jurisdictional grant and waiver of sovereign immunity contained in the OCSLA in explicit terms" (Pet. 16). Petitioner goes on to suggest (*ibid.*) that certain decisions in which the issue *could* have been discussed support petitioner's construction of the OCSLA. But the government did not raise, in any of the cases petitioner cites, the objection to district court jurisdiction that was raised in this case. Therefore, they are not precedent against that objection. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). That rule applies fully to jurisdictional objections. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 & n.29 (1984); *Hagans* v. *Levine*, 415 U.S. 528, 534-535 n.5 (1974); *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952); *United States* v. *More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.).

[15] See also S. Rep. 93-1140, *supra*, at 148-149 (minority views) (list of types of actions that could be brought under section of original bill that eventually became Section 23; list does not include any actions for money damages).

States or its agents or instrumentalities for relief other than money damages are brought in district court under Section 23. See, *e.g.*, *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151 (1981) (action to force Secretary of the Interior to promulgate new bidding systems); *Superior Oil Co.* v. *Andrus*, 656 F.2d 33 (3d Cir. 1981) (action to compel issuance of a lease). Section 23 uses language that contemplates injunctive relief, not payment of money—"a civil action * * * to *compel compliance* with this subchapter" (43 U.S.C. 1349(a) (emphasis added)).

The only provision of Section 23 that explicitly discusses the payment of money refers not to money damages but to the payment of such incidental items as "costs of litigation, including reasonable attorney and expert witness fees" (§ 23(a)(5), 43 U.S.C. 1349(a)(5)). Petitioner's apparent contention (Pet. 15) that a general waiver of sovereign immunity for money damages can be inferred from such a fees provision is, to say the least, novel. Consent to the award of costs, including attorneys' fees and expert witnesses' fees, can hardly be equated with consent to the award of a money judgment on a substantive legal claim. Cf. *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986) (consent to award of money judgment on a substantive legal claim cannot be equated with consent to award of interest on that judgment).

Nor does Section 10 of the OCSLA, 43 U.S.C. 1339, constitute consent to the award of money damages.[16] That section is merely a mechanism for making refunds of overpayments *found by the Secretary of the Interior*. Section 10(a), 43 U.S.C. 1339(a), provides

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[16] Section 10 is quoted in full at pages 5-6 of the petition.

that the Secretary of the Interior may certify overcollections to the Secretary of the Treasury, who is then authorized and directed to make repayment; Section 10(b), 43 U.S.C. 1339(b), requires a report to Congress justifying the proposed repayment. Nothing in the statute suggests that this mechanism, designed for processing repayments *agreed to* by the government, authorizes a district court to enter a money judgment against the United States in a case where the Secretary of the Interior refuses to issue the certification. Given that waivers of sovereign immunity must be clearly expressed,[17] the provisions of Section 10 cannot support petitioner's argument that the OCSLA, rather than (or in addition to) the Tucker Act, provides the necessary waiver of sovereign immunity for money damages.[18]

3. Petitioner in this case arguably seeks not only monetary relief but also prospective relief (see note 6, *supra*). And, in the body of its petition (but not in the questions presented), petitioner asserts (Pet. 16-17) that in these circumstances the court of ap-

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[17] See, *e.g.*, *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7 (internal quotation marks and citations omitted) ("[i]n analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign * * * and not enlarge the waiver beyond what the language requires").

[18] To be sure, Section 10, when coupled with the waiver of sovereign immunity for money damages in the Tucker Act, is a sufficient implication of a right to compensation that an action will lie in the Claims Court (see note 13, *supra*). But there is no basis for petitioner's additional bald assertion (Pet. 15 n.11) that *by itself* "Section 10 can also be interpreted as a waiver of sovereign immunity for claims for the refund of excess royalties." Nothing in Section 10 even remotely purports to be a waiver of sovereign immunity.

peals should have retained jurisdiction over its request for prospective relief "[e]ven if * * * Claims Court jurisdiction under the Tucker Act is exclusive in this case" (Pet. 16).

The circuits are in fact divided on the question whether a case presenting both a claim for monetary relief and a request for prospective relief involving the same issues can be split into two lawsuits. We are today filing a petition for a writ of certiorari to review the disposition of this issue by the First Circuit in *Massachusetts* v. *Secretary of Health & Human Services*, 816 F.2d 796 (1987), petition for cert. pending *sub nom. Bowen* v. *Massachusetts*, No. 87-—. We are serving a copy of our *Massachusetts* petition on counsel for petitioner. However, given that this issue is not included in petitioner's questions presented (Pet. i), given that petitioner did not seek to have the action split in that manner in the courts below, and given that the district court has transferred the case to the Claims Court, we submit that the Court should not grant the petition in this case to review this issue, nor should the Court hold this case pending disposition of the petition in *Massachusetts*.[19]

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[19] We note that *Massachusetts* involves the common situation in which the general review provisions of the Administrative Procedure Act (APA) are alleged to waive sovereign immunity for the adjudication of claims for prospective relief, and thus to permit splitting such claims from Tucker Act claims and adjudicating each claim in a different forum. See *Massachusetts*, 816 F.2d at 800; see also, *e.g.*, *New Mexico* v. *Regan*, 745 F.2d 1318, 1321 (10th Cir. 1984) (rejecting APA-based argument for claim splitting), cert. denied, 471 U.S. 1065 (1985); *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 858 (8th Cir. 1983) (accepting APA-based argument for claim splitting); *Warner* v. *Cox*, 487 F.2d 1301,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1987

1304-1305 (5th Cir. 1974) (rejecting APA-based argument). The present case does not involve a contention that the APA provides a basis for retaining the non-monetary relief portion of the controversy, but rather involves the OCSLA and its own waiver of sovereign immunity for non-monetary claims. Although we do not think that the APA and OCSLA ultimately lead to any difference in the outcome of the claim-splitting issue, a decision by this Court endorsing or rejecting claim splitting in an APA case (or would-be APA case) such as *Massachusetts* would resolve an issue of more general importance than would a decision in this case.

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NO. 87-372

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In the Supreme Court of the United States

OCTOBER TERM, 1987

AMOCO PRODUCTION COMPANY
Petitioner

VERSUS

DONALD P. HODEL, SECRETARY,
DEPARTMENT OF THE INTERIOR, *ET AL.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In their argument in opposition, respondents raise two "considerations," apart from the merits of the jurisdictional decision below, that they contend make review of this case in this Court inappropriate.

Respondents first contend that both the Fifth Circuit and the district court have lost all jurisdiction over this case because the case files have been transferred to the United States Claims Court and, as a consequence, there is no longer any jurisdictional issue for this Court to review. This imaginary limitation on the Court's powers is unfounded. The authorities cited by respondents merely hold that a circuit court lacks jurisdiction to hear a case that has been transferred properly out of that circuit. This principle certainly does not apply to the Supreme Court which has

both appellate jurisdiction and supervisory powers over both the transferor and the transferee courts in this case.

Respondents also ignore the provision of the Judicial Code that denies the Claims Court "jurisdiction of any claim . . . in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States. . . ." 28 U.S.C. § 1500.[1] Thus, the granting of petitioner's application for writ of certiorari would defeat the jurisdiction of the United States Claims Court over this case. Upon this Court's review of the merits of this jurisdictional issue, the Court could then elect to remand the case to the Court of Appeals for the Fifth Circuit or to the United States Claims Court and could order the transfer of the case files as necessary.

The second preliminary "consideration," pertaining to the recent change in policy by the Interior Board of Land Appeals, raised by respondents was already addressed by petitioner in its petition (Pet. 19-21) and that discussion will not be repeated here.

On the merits of the jurisdictional issue, respondents claim that, because the decision below seemingly is one of first impression, this Court should not grant certiorari. Presumably, respondents believe that only a split of authority among the circuits constitutes a sufficient ground for this Court to grant certiorari. However, because jurisdictional questions concern the power and authority of a court to decide a controversy, they are, by their very nature, important. This Court has frequently recognized the importance of jurisdictional questions in the granting of writ applications. *E.g., United States v. Sherwood*, 312

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[1] As originally worded, this provision made clear that the pendency of a proceeding in the Supreme Court, on appeal from a decision of another court, would suspend Claims Court jurisdiction. 28 U.S.C. § 1500, Revision Note. The revision did not alter the intent of the statute, but merely omitted these words because they were deemed unnecessary. *Id.*

U.S. 584, 586 (1941); *United States v. Hohri, et al.*, ____U.S.____, 107 S.Ct. 2246, 2249(1987). Furthermore, to the extent that a conflict among the circuits might be necessary, such conflict exists concerning the exclusivity of the Tucker Act remedy. *See* discussion and cases cited at Pet. 11-13.

On the merits of the jurisdictional issue, respondents, although conceding that the OCSLA contains both a jurisdictional grant and a waiver of sovereign immunity, contend that this waiver does not include an action for "money damages." Respondents claim that the waiver contained in the OCSLA is merely for civil actions "to compel compliance with this subchapter." 43 U.S.C. § 1349 (a)(1). Opp. 15. Respondents' analysis is incorrect. First, Amoco's case is not a suit for money damages.[2] As the court below indicated, Amoco seeks

> (1) a declaratory judgment that the IBLA decision is void and ineffective because it is arbitrary, capricious, an abuse of discretion and is illegal and unconstitutional (fifth amendment violation); (2) a remand to the DOI for "proper calculation" of underpaid royalties and interest penalties for late payments; and (3) a permanent injunction against defendants from enforcing or applying the IBLA decision.

Pet. A-19. Although Amoco, if it is successful on the merits of its case, will ultimately recover a portion of the royalties and late payment penalties that were unlawfully extracted, its suit cannot in any way be characterized as a suit for money damages. Moreover, because both the lease and the

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[2] In a typical action for damages, a party seeks money indemnification for harm caused by the other party; that harm is quantified and a sum of money is computed which will compensate the party harmed. In this case, however, petitioner merely seeks the review of agency action by the IBLA (who speaks for the Secretary of the Interior) and ultimately the return of certain royalties that were unlawfully extracted.

OCSLA require the payment of royalty as a percentage "in amount or *value* of the production saved, removed, or sold" (43 U.S.C. § 1337(a)(1)(A))(emphasis added) and because Amoco contends that the Secretary has unlawfully valued the production for royalty purposes, [3] this suit, seeking review of that improper valuation, falls squarely within the waiver of sovereign immunity permitting civil actions against the United States "to compel compliance with this subchapter." 43 U.S.C. § 1349(a)(1).

Finally, even though respondents have filed a petition for writ of certiorari in a closely related case, *Bowen v. Massachusetts,* No. 87-712, involving the question of whether a case presenting both a claim for monetary relief and a request for prospective relief can be split into two lawsuits, respondents contend that such case should not influence the Court in granting petitioner's writ application in the existing case because, *inter alia,* this issue was not included in petitioner's questions presented. Opp. 17. Petitioner notes that Supreme Court Rule 21.1(a) states that the "[t]he statement of a question presented will be deemed to comprise every subsidiary question fairly included therein." Petitioner submits that the second question presented encompasses the issue concerning the splitting of claims between monetary relief and prospective relief. Pet. i.

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[3] The issue on the merits of this case is whether the Secretary of the Interior can value natural gas for royalty purposes at a value in excess of the maximum lawful price at which Amoco can legally sell the gas.

For the foregoing reasons and the more extensive reasons presented in its petition, Amoco respectfully requests that its Petition for Writ of Certiorari to the Fifth Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Petitioner's Reply Memorandum has been served on all parties by placing copies in the United States mail, properly addressed and postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., 20530, and the Solicitor, Department of Interior, C Street (between 18th & 19th Streets) N.W., Washington, D.C., 20240, on the 17th day of November, 1987.

_____

Gene W. Lafitte